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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 14

CORNELIA HARRIS, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 11, 1950.

CERTIORARI GRANTED MARCH 27, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 596

CORNELIA HARRIS, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. A., Second Circuit	a	1
Appendix to brief of Taxpayer	a	1
Docket entries	1	1
Findings of fact and opinion, Murdock, J.	4	3
Decision	12	10
Exhibit 5—Agreement dated February 27, 1943	13	10
Exhibit 7—Findings of fact, conclusions of law and judgment and decree of divorce, dated March 6, 1943	27	20
Opinion, Hand, J.	33	24
Opinion, Swan, J., dissenting in part	41	32
Judgment	42	33
Clerk's certificate (omitted in printing)	42	
Stipulation as to record on petition for writ of certiorari	43	34
Stipulation as to record on writ of certiorari	44	35
Order allowing certiorari	45	36

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[fol. a]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CORNELIA HARRIS, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

against

CORNELIA HARRIS, Respondent

On Petitions to Review the Decision of the Tax Court of the United States

Appendix to Brief of Taxpayer

[fol. 1] IN THE TAX COURT OF THE UNITED STATES

Docket No. 11616

CORNELIA HARRIS, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

1946

Jul. 24—Petition received and filed. Taxpayer notified. Fee paid.

Jul. 24—Copy of petition served on General Counsel.

Jul. 24—Request for hearing at New York City filed by taxpayer. 8/5/46 Granted.

Sep. 13—Answer filed by General Counsel.

Sep. 19—Copy of answer served on taxpayer. (New York City)

1947

Aug. 12—Hearing set October 27, 1947 at New York City.

Oct. 20—Motion for continuance to December 1, 1947 at New York City filed by General Counsel. 10/21/47 Granted.

Oct. 27—Hearing set 12/1/47 at New York City.

Dec. 3—Hearing had before Judge Murdock on merits. Citations of Authorities by counsel for petitioner filed. Briefs due 1/17/48. Replies 2/1/48.

Dec. 19—Transcript of hearing 12/3/47 filed.

[fol. 2] 1948

Jan. 13—Brief filed by taxpayer. Copy served 2/3/48.

Jan. 14—Motion for extension to 2/2/48 to file brief filed by General Counsel. 1/19/48 Motion granted.

Feb. 2—Brief filed by General Counsel. Copy served.

Feb. 12—Reply brief filed by taxpayer. Copy served.

Apr. 20—Stipulation of facts filed.

Apr. 30—Findings of fact and opinion rendered, Judge Murdock. Decision will be entered under Rule 50. 5/4/48 Copy served.

Jul. 1—Computation for entry of decision—agreed to, filed by General Counsel.

Jul. 13—Decision entered. Judge Turner. Div. 8.

Oct. 4—Petition for review by U. S. Court of Appeals for the Second Circuit with assignments of error filed by taxpayer.

Oct. 4—Proof of service filed.

Oct. 5—Petition for review by U. S. Court of Appeals for the Second Circuit filed by General Counsel.

Oct. 5—Notice of filing petition for review sent to Irwin N. Wilpon, Esq. filed.

Oct. 7—Proof of service of filing petition for review from I. N. Wilpon filed.

[fol. 3] 1948

Oct. 11—Affidavit of service of filing petition for review on Charles Oliphant filed.

Oct. 12—Proof of service of petition for review filed.

Oct. 29—Motion for extension to 1/3/49 to prepare and transmit record filed by General Counsel.

Oct. 29—Order extending time to 12/31/49 to prepare and transmit record, entered.

1948

Nov. 4—Motion for extension to 1/3/49 to prepare and transmit record filed by taxpayer.

Nov. 4—Order extending time to 12/31/49 to prepare and transmit record, entered.

Dec. 21—Statement of points filed by taxpayer.

Dec. 21—Statement of points filed by General Counsel with statement of services thereon.

Dec. 21—Joint designation of record filed.

[fol. 4] IN THE TAX COURT OF THE UNITED STATES

Docket No. 11616

CORNELIA HARRIS, Petitioner,

v.

COMMISSIONER OF INTENAL REVENUE, Respondent

Promulgated April 30, 1948

Gift Tax—Nonresident Alien—Bank Deposits.—Money on deposit in American banks is not exempt or excluded from gift tax as property without the United States on the theory that section 863 (b) of the estate tax chapter is to be read into the gift tax chapter.

Gift Tax—Premiums on Insurance.—Payments of premiums by wife on policy belonging exclusively to husband were not precluded from being gift on ground that wife had an interest in the policies as husband's heir.

Gift Tax—Settlement at Divorce.—Payments by wife pursuant to property settlement adopted in decree of divorce held not gifts following Estate of Josephine S. Barnard, 9 T. C. 61.

Irwin N. Wilpon, Esq., for the petitioner.

Scott A. Dahlquist, Esq., for the respondent.

Findings of Fact and Opinion

[fol. 5] The Commissioner determined the following deficiencies in gift tax:

Year	Tax	Penalty
1940	$ 1,275.32	$
1941	13,699.83	
1942	9,861.53	
1943	31,434.34	
1944	1,365.00	
1945	360.00	90.00

The parties settled a number of their differences, leaving the following issues for decision:

(1) Did the petitioner, a nonresident alien, make taxable gifts by transferring funds to or for her husband from her bank account in a New York bank,

(2) If so, were checks, in payment of premiums on his annuity insurance policy, gifts,

(3) Were transfers by the petitioner to her husband, pursuant to a property settlement agreement adopted in a decree of divorce, taxable gifts,

(4) If so, was her promise in that agreement to make monthly payments to her husband a gift when the promise was made or only later as payments were made,

(5) If the promise was a gift, should the value be reduced by the income tax on the gross amount to be paid?

Findings of Fact

The petitioner filed gift tax returns for the years 1940 to 1944, inclusive, with the collector of internal revenue for the third district of New York.

The petitioner was born an American citizen, in New York City, on February 1, 1883. Her name was Cornelia Brady. She became a British subject in 1903 through her marriage to Leland H. deLangley, a British subject. They were divorced in 1924 and three months later she married Reginald Wright, also a British subject, who was fourteen years, three months, and eighteen days younger than she. They have no [fol. 6] children. The petitioner obtained a divorce from Wright in Reno, Nevada on March 6, 1943.

The petitioner resided in England from 1903 until she and Wright came to the United States, on September 20, 1940.

They came in order to get away from the war in Europe and intended to return after the conclusion of the war. They did not dispose of their houses, one in London and one in Biarritz, France. They entered the United States on a temporary one year visa, permitting them to remain until September 20, 1941. That visa was renewed later for another year, permitting them to remain until September 20, 1942. They resided in leased quarters at the Hotel Pierre in New York City until August 1942 when the petitioner separated from Wright. Shortly thereafter she went to Reno, Nevada. She reclaimed her American citizenship there on November 21, 1942 and on March 6, 1943 was granted the divorce from Wright.

Both the petitioner and Wright have remained in the United States since September 20, 1940.

The respondent concedes that the petitioner was in the United States as a nonresident alien from September 20, 1940 until some time in September 1942.

The petitioner has never been engaged in business in the United States. She maintained several bank accounts in the National City Bank of New York in which she had money on deposit and on which an attorney-at-law held a power of attorney, made all deposits and drew checks on her behalf. The National City Bank was a corporation carrying on the banking business.

The petitioner gave Wright the following amounts from her accounts in the National City Bank during the period from September 20, 1940 to September 1942: $29,095.91 during 1940, $76,170.59 during 1941 and $39,455.18 during 1942. She also paid $1,800.03 in 1940 and $3,605.22 in 1941 from the same accounts as premiums on an endowment policy of insurance owned entirely by Wright. The insured was [fol. 7] Wright and the policy was to become payable to him, his executors, administrators or assigns on May 12, 1953 or at his earlier death.

The petitioner and Wright entered into a property settlement agreement on February 27, 1943. The net worth of the petitioner's estate was in excess of $1,000,000 at that time. The net worth of Wright's estate at that time was substantial. Each agreed to release completely the property of the other from all claims arising out of their marriage. Each transferred property of substantial value to the other.

The Commissioner determined that the value of the property transferred to Wright exceeded that transferred to the petitioner by $117,903.03 and now agrees that the difference is $107,150.78 including $41,291.88, representing the then value of her promise to pay Wright $416.66 monthly for ten years. The court, in granting the divorce, approved the property settlement agreement and found that the payments of $416.66 per month were "in discharge of a legal obligation which, because of the marital relationship, has been imposed upon the plaintiff."

Opinion

Murdock, Judge:

The respondent concedes in his brief that the petitioner was a nonresident alien when she made the transfers during 1940, 1941, and 1942 which are in dispute under the first issue. The evidence alone might leave a question as to residence, Cf. *John Henry Chapman*, 9 T. C. 619, but the Court accepts the agreement of the parties for the purpose of this case. The point upon which the parties disagree in regard to these transfers is whether they are free from gift tax because made from monies upon deposit in a bank in the United States. Both the estate tax and the gift tax chapters provide that they apply, in the case of non resident aliens, only to transfers of property situated within the United States. Section 861(a) and section 1000(b), I. R. C. [fol. 8] Section 863(b) of the estate tax chapter expressly provides that "any moneys deposited with any person carrying on the banking business, by or for a nonresident not a citizen of the United States who was not engaged in business in the United States at the time of his death" shall not "be deemed property within the United States." The gift tax chapter contains no such provision. The petitioner argues, nevertheless, that the two chapters must be read in *pari materia* so that "property within the United States" means the same in each. The Commissioner argues that bank deposits are property within the United States for gift tax purposes since it took a special provision of the estate tax chapter to exclude them from the estate tax and no similar exemption was granted for gift tax purposes.

The argument of the petitioner in regard to the purpose of the gift tax and its relation to the estate tax, and the cases cited have been carefully considered. The Supreme

Court has said on more than one occasion that the two taxes are in *pari materia* and must be construed together and "there is every reason for giving the same words in the gift tax the same reading." *Sanford* v. *Commissioner*, 308 U. S. 39; *Merrill* v. *Fahs*, 324 U. S. 308. The petitioner relies particularly upon *Commissioner* v. *Bristol*, 121 Fed. (2d) 129, reversing 42 B. T. A. 263; and *Merrill* v. *Fahs*, supra.

The question in the *Bristol* and *Merrill* cases was whether an antenuptial agreement in which the prospective husband transferred property to the prospective wife in consideration of release of her dower and courtesy rights was a gift. The taxpayers argued that the release of dower and courtesy rights by the wife was "an adequate and full consideration in money or money's worth." Those same words appeared in both the gift tax and the estate tax provisions, but the estate tax provisions contained another, not appearing in the gift tax, to the effect that the relinquishment of marital rights shall not constitute consideration in money or money's [fol. 9] worth for the purposes of the estate tax. The taxpayers reasoned that the absence of that provision in the gift tax required the recognition of adequate consideration in money or money's worth in the surrender of marital rights by the prospective wife. The Circuit Court of Appeals for the First Circuit, in the *Bristol* case, said that even if the insertion of the language in the estate tax were regarded as an actual change in the treatment of marital rights as consideration for estate tax purposes, nevertheless, "we think it probable that the same provisions should be read into the gift tax". No similar statement is to be found in the opinion of the Supreme Court in the *Merrill* case.

Those two cases are distinguishable from the present case. The Court pointed out in each of those cases that the release of marital rights was not regarded as an adequate and full consideration in money or money's worth, even before the amendment to the Estate Tax Act containing the express provision.[1] For example, the Court said in the *Bristol* case:

> "We think, however, that the amendment was added merely from an abundance of caution and should be

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[1] Cf. Burnet v. Guggenheim, 288 U. S. 280; Elizabeth W. Lyman, 23 B. T. A. 540.

> regarded as declaratory of the law as it previously existed."

The Supreme Court said in the *Merrill* case:

> "Plainly, the explicitness was one of cautious redundancy to prevent 'subversion of the legislative intent.' Without this specific provision, Congress undoubtedly intended the requirement of 'adequate and full consideration' to exclude relinquishment of dower and other marital rights with respect to the estate tax."

Thus the decisions in those cases would have been the same had there been no provision in regard to marital rights in the estate tax law. It has not been suggested that money on deposit in a bank in the United States would not be [fol. 10] regarded as property situated in the United States in the absence of some statutory provision to the contrary or that section 863(b) was merely declaratory of the existing law. Cf. *Smith* v. *Ajax Pipe Line Co.*, 87 Fed. (2d) 567; Beale—Conflict of Laws (1935 Ed.), section 118C.33. Also the Court pointed out in the *Merrill* case that identical construction of the language there considered was necessary in order to carry out the purpose of Congress. Congress added section 863(b) so that American banks would not be at a disadvantage in competing with foreign banks in obtaining deposits from nonresident aliens not engaged in business here. The petitioner sees that purpose served equally as well by exempting or excluding the same deposits from the gift tax. But Congress did not insert any corresponding provision in the gift tax law and the failure can not be attributed to oversight because a similar reason for such a provision does not exist. Death may overtake a person without warning, leaving the deposit subject to death duties, but a gift is made voluntarily. It would be relatively simple for a nonresident alien having funds on deposit in a bank in the United States to transfer those funds out of the United States and then make a gift free from United States gift tax. This circumstance may explain why Congress made no specific provision in the gift tax law covering foreign owned deposits. It may have had other reasons. The fact remains that it did not specifically exempt or exclude them and an exemption or exclusion can not be read into the law on the theory that an exact parallel must be found between

the estate and gift tax provisions. As the Supreme Court said in the *Merrill* case, "Correlation of the gift tax and the estate tax still requires legislative intervention."

The petitioner next argues that, if the first issue is decided against her, nevertheless, the payments of premiums on her husband's insurance policy were not gifts. Her point is that she had an interest in the policy because the proceeds would go either to Wright or to his estate and she would benefit [fol. 11] at his death as the chief beneficiary of his estate. She does not contend that her interest in the policy arises out of her payment of the premiums or dispute that the policy belonged to her husband with the right to him to dispose of it and the proceeds as he might wish. She also concedes that her inchoate interest would terminate if the policy lapsed or if he made some other disposition of it. It is obvious that she had no interest in this policy which would prevent her payment of these premiums from being taxable gifts. She could make the same claim that she is making here if she gave him money for any other purpose as, for example, to buy securities. The case of *Grace R. Seligmann*, 9 T. C. 191, cited by the petitioner, is readily distinguishable because there the taxpayer who paid the premiums was the beneficiary of a trust to which her husband had transferred his insurance policies on his life.

The petitioner's next contention is that transfers which she made to her husband, pursuant to a property settlement agreement adopted in a subsequent decree of divorce, were not taxable gifts because there was an adequate and full consideration in money or money's worth for those transfers. The Commissioner concedes that the facts in this case are not distinguishable from those on which we decided for the petitioner in *Estate of Josephine S. Barnard*, 9 T. C. 61. He argues that that decision is incorrect. The *Barnard* case will be followed as authority in this case and consideration of two alternative issues raised by the petitioner becomes unnecessary.

Reviewed by the Court.

Decision will be entered under Rule 50.

[fol. 12] IN THE TAX COURT OF THE UNITED STATES

Docket No. 11616

CORNELIA HARRIS, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

The parties, on July 1, 1948, filed an agreed computation, pursuant to the Court's Findings of Fact and Opinion promulgated April 30, 1948. Therefore, it is

Ordered and Decided, that there are overpayments in gift tax and penalty as follows:

	Overpayment	
Year	Tax	25% Penalty
1940	$ 717.69	
1941	6,578.83	
1942	4,027.47	
1943	28,478.40	
1944	1,222.50	
1945	360.00	$90.00

All of said amounts were paid after the mailing of the notice of deficiency.

(Signed) Bolon B. Turner, Judge.

Enter: Entered Jul. 13, 1948.

[fol. 13] PETITIONER'S EXHIBIT 5

This Agreement, by and between Reginald Wright, presently residing in the City of New York, State of New York, hereinafter referred to as the "Husband", and Cornelia Brady Wright, a resident of and now domiciled in the City of Reno, County of Washoe, State of Nevada, hereinafter referred to as the "Wife",

Recitals

(a) The parties hereto married on or about the twenty-first day of July, 1924, at London, England. There are no children the issue of said marriage and none is expected.

(b) In consequence of disputes and unhappy differences, the parties have heretofore separated and are now, and for some time have been, living apart. A suit for divorce has been filed by the Wife against the Husband, which suit is being contested by the Husband and is now pending in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, of which Reno is the county seat. This agreement is made for the purpose of settling the respective property rights of the parties hereto and of removing the subject matter thereof from the field of litigation.

(c) The Husband is the owner of the following described property:—

1. Two certain parcels of land, together with the dwelling houses located thereon, one at

[fol. 14] (a) Biarritz, France, and the other at

(b) 21 Culross Street, London, England

2. A life insurance policy issued by the Standard Assurance Company, wherein his estate is named as beneficiary and the surrender value of which, at the present time, is the approximate sum of $30,000.00;

3. Certain notes and capital stock of Earl & Ball Inc.;

4. The proceeds of a note of one Wayne Lonergan;

5. A Rolls Royce automobile now located in New York City, New York.

(d) As to certain items of household furnishings, including antiques, tapestries and bric-a-brac, some of which are now located at 1 East 62nd Street, New York City, New York and certain other household and personal effects, including furniture, rugs and paintings now stored and located in various parts of Europe, to wit: England, Spain and France, some of said items are owned by the Husband and others by the Wife.

(e) In the year 1924 the Wife created a trust in favor of her former husband, Leland H. de Langley, wherein Harry Civiletti and the City Bank Farmers Trust Company of New York City are now acting as trustees. Said trust,

which has been from time to time amended, terminates upon the death of the said Leland H. de Langley. The trust, [fol. 15] among other things, provides that upon the death of Leland H. de Langley, Kathleen de Langley, the present wife of said Leland H. de Langley, shall receive the sum of $20,000.00 from the corpus of said estate as it shall then exist. In the event the said Kathleen de Langley predeceases her husband, said sum shall be paid to her children. It is estimated that the commissions and fees of the trustees of said trust, and other expenses will, upon the termination of said trust, approximate the sum of $20,000.00. A copy of the said trust is hereto annexed, made a part hereof and marked Exhibit "A".

(f) Both parties claim an interest in and to an undivided 21/90ths interest in that certain piece and parcel of land situated in the City of New York, State of New York, and known as and hereinafter referred to as the "Four Forty-eight Fifth Avenue Property". Both parties made contributions to the purchase price of said property and by reason thereof the Husband is now obligated under certain promissory notes to the National City Bank of New York in the principal sum of approximately $47,650.00 with interest thereon at the rate of 3% per annum. The Husband has deposited with said bank, as partial security for the payment of said notes, his stocks of a value of approximately $28,000.00 and the Wife has deposited with said bank, as partial security for the payment of said notes, her stocks and bonds of an approximate value of $61,700.00. The property was heretofore transferred by the Husband to the Four Forty-eight Realty Corporation.

[fol. 16] Agreement

Now, therefore, in consideration of the premises and the mutual promises and undertakings herein contained and for other good and valuable consideration, the parties hereto agree:—

1. That each of the parties shall, except as herein provided, own, have and enjoy independently of any claim or right of the other party, all property of every kind which is now owned or held by him or her, or which may hereafter come to him or her, with full power to him or her to dispose of the same as fully and effectually in all respects and for all purposes as if he or she were unmarried.

2. That the Husband is and shall remain the sole owner free and clear of any claim of the Wife, of all of the real and personal properties mentioned in Recital (c) hereof. The Wife hereby reaffirms that at the time of the acquisition by the Husband of the real property set forth in Recital C 1 hereof, she released to the Husband all rights of dower, if any, she had therein, and any and all claims of any kind or nature whatsoever in and to the said real property.

3. That commencing on the 1st day of March, 1943, the Wife shall pay to the Husband the sum of $416.66 a month and shall continue to make said payments of $416.66 monthly for the period of ten years. The herein obligations on the part of the Wife shall be a charge against the estate and the executors and administrators of the Wife in the event that she should die before the expiration of the ten year period. In the event of the death of the Husband the payments of $416.66 a month for the said ten year period [fol. 17] shall nevertheless continue and the monthly payment of $416.66 shall be made to the executors, administrators, legatees, distributees or assigns of the Husband. As security for the payments to be made by the Wife, as provided for in this paragraph, the Wife hereby transfers, assigns and sets over to the Husband her entire interest as remainderman in the trust to be set up under paragraph 5 hereafter and also in the trust to be set up under paragraph 8 hereafter. Upon the termination of the ten year period and provided payment of $416.66 a month shall have been made and completed, as provided for in this paragraph, the said interests as remainderman in the said two trusts shall revert to the Wife or her estate.

4. The aforesaid monthly payments shall be regarded and includible, as, income to the Husband, and shall not be includible in the gross income of the Wife, and the Husband shall pay the income tax which may be levied thereon as a tax against the Husband. In the event that Federal or State taxing authorities or both, shall determine that the amounts to be paid to the Husband under paragraph 3 hereof are not deductible from the Wife's income for the purposes of income taxation, then the Wife shall have the right to deduct from the payments to be made to the Husband only, the amount of the income tax (and no other tax such as gift tax) which the Husband would have been required to pay

thereon if the payments to be made were includible in the income of the Husband and which the Husband would have been required to pay if the taxing authorities had assessed the same to him.

5. The Husband shall simultaneously with the receipt of [fol. 18] the sum of $25,000.00, as set forth in paragraph 6 hereafter, cause to be conveyed to Harry Civiletti and Hilbert I. Trachman as co-trustees by trust deed attached hereto and made part hereof and marked Exhibit "B" the 21/90ths interest in said Four Forty-eight Fifth Avenue property and shall furnish a title policy issued by the Title Guaranty and Trust Company of New York therefor, showing the property to be free and clear from all encumbrances or any title defects. The terms of the said trust are set forth in said Exhibit "B". A partition suit affecting the Four Forty-eight Fifth Avenue property has heretofore been instituted by the Four Forty-eight Realty Corporation and is now pending undetermined, in the Supreme Court of the State of New York. The Husband will, upon the receipt of the sum of $25,000.00 as set forth in paragraph 6 hereafter, obtain a discontinuance of the said partition suit insofar as the plaintiff in said action, the Four Forty-eight Realty Corporation, is concerned. The Husband assumes no obligation to obtain a discontinuance of the said suit by the defendants Cornelia Livermore and Elisa S. Kip, the Wife agreeing to obtain a discontinuance of the said suit by the defendants, Harry Civiletti and City Bank Farmers Trust Company of New York City as trustees.

6. As to the stocks of the Husband of a value of approximately $28,000.00, now held as security by the National City Bank of New York, as mentioned in Recital (f) hereof, the Wife gives her consent that said securities may be immediately sold and converted into cash and from the proceeds thereof that the Husband shall be paid the sum of $25,000.00 [fol. 19] lawful money of the United States and the remainder of the proceeds thereof shall be applied firstly to the payment of such taxes as may be due up to March 1, 1943 upon the 21/90ths interest in the Four Forty-eight Fifth Avenue property referred to in paragraph 5 hereof; secondly, such taxes as may be due upon the said stocks; and thirdly to the cost of the title policy to be issued by the Title Guaranty and Trust Company of New York, as referred to

in paragraph 5. The balance, if any, shall be applied upon the aforementioned promissory notes of the Husband to the said National City Bank of New York, in the principal sum of approximately $47,650.00.

7. As to the indebtedness of the Husband under certain promissory notes to the National City Bank of New York in the approximate sum of $47,650.00, with interest thereon at the rate of 3% per annum, as referred to in Recital (f) hereof, the Wife hereby assumes the said indebtedness of $47,650.00 with interest at the rate of 3% per annum. The Wife shall cause the said National City Bank of New York to return to the Husband, within ten days from the date hereof, the said notes, in approximately the sum of $47,650.00. The said Wife shall, and does hereby save and keep the said Husband safe and harmless from any claims of any kind or nature in connection with the said indebtedness of the Husband to the National City Bank in the sum of $47,650.00, together with interest at the rate of 3% per annum.

8. The Wife shall forthwith cause a trust to be created wherein Harry Civiletti and Hilbert I. Trachman shall be [fol. 20] named as co-trustees in connection with her interest as remainderman under the de Langley trust referred to in Recital (e) hereof. The terms of the said trust are set forth in Exhibit "C" hereto attached and made a part hereof. The Wife shall execute Exhibit "C" simultaneously with the execution of this agreement. Payments of income to be made to the Husband under the trust created by Exhibit "C" shall accrue from the date of the death of Leland H. de Langley, and in the event of the death of Leland H. de Langley before the completion of the payments to be made to the Husband under the provisions of paragraph 3 hereof, the payments of income provided for under the trust created by Exhibit "C" shall be in addition to the payments to be made pursuant to paragraph 3 hereof and also in addition to the payments of income under the trust created by Exhibit "B", as set forth in paragraph 5 hereof. The Wife shall not amend the present de Langley trust so as to render ineffectual the terms of the trust created by Exhibit "C". Federal or State income taxes, if any, on the income which the Husband shall receive under Exhibit "C" shall be the obligation of the Husband.

9. As to the furniture, antiques, tapestries and bric-a-brac of all kinds and description, now in the possession of the Husband, the same shall be the property of the Husband, free and clear of any claim of the Wife with the exceptions set forth and contained in Schedule "One", which is attached hereto and made a part hereof. The articles set forth in said Schedule "One" are the property of the Wife, free and clear from any claim of the Husband. Any articles of personal property as are in the possession of the Wife, [fol. 21] including all jewelry, are the property of the Wife, free of any claim of the Husband. As to the articles set forth in Schedule "One" those articles which are in New York City will be delivered by the Husband to the Wife, or her agent, within ten days. As to the articles which are in England, Spain and France, the Husband assumes the obligations to deliver them to the Wife, or her agent, only in the event that they again come into his possession after the termination of the war. The Husband shall make payment of any unpaid bills in connection with any of the personal property now in his possession and referred to in this paragraph.

10. Each party hereby releases and relinquishes any and all rights that he or she may have or may hereafter acquire:—

(a) To share in any capacity whatsoever in the estate of the other party upon the latter's death; and

(b) To act as executor or administrator of the estate in any manner.

It is the intention of the parties hereto that their respective estates shall be administered in all respects as though no marriage had been solemnized between them.

11. Except as herein to the contrary provided, the parties shall and do hereby mutually remise, release and forever discharge each other from any and all actions, suits, debts, claims, demands and obligations whatsoever, both in law and in equity, which either of them ever had, now has, or may hereafter have against the other upon or by reason of any [fol. 22] matter, cause or thing up to the date of the execution of this agreement, it being the intention of the parties that henceforth there shall be, as between them, only such rights and obligations as are specifically provided in this

agreement. The Wife and Husband mutually release each other of any claim to any property, real or personal not referred to in this agreement, which is in the name of or owned by either one of them. The Husband hereby saves and keeps the Wife safe and harmless from any liability on a mortgage presently existing on the property known as "21 Culross Street", London, England, it being the understanding of the Husband that he is the sole obligor under the bond and mortgage affecting the said premises. The Husband likewise hereby saves and keeps the Wife safe and harmless from any liability of any kind or nature whatsoever in connection with the property located at Biarritz, France.

12. Each party shall, at any time, and from time to time, hereafter execute and deliver to the other party any and all instruments and assurances that the other party may reasonably require for the purpose of giving full force and effect to the provisions of this agrement; neither the Husband or Wife shall be required to execute any instrument which may create any tax liability on either part.

13. Neither the Husband nor the Wife shall be responsible for any tax liabilities of any kind or nature whatsoever that may exist or may be assessed against the other by reason of any acts or facts prior to the date of this agreement. The Wife shall be responsible for and shall make payment [fol. 23] of all gift taxes that may be due or payable on any property, real or personal, which was transferred by the Wife to the Husband as a gift prior to the date of this agreement, or any gift taxes which may be due or payable by reason of any transfers pursuant to the terms of this agreement, or any gift taxes that may become due or payable in the future on any transfers which the Wife will make in the future pursuant to the covenants assumed by the Wife in this agreement. The Wife shall and does hereby save and keep the Husband safe and harmless from any liability for the nonpayment by the Wife of such gift taxes. The Wife shall not be responsible for gift taxes, if any, in connection with the real property located at Biarritz, France, and 21 Culross Street, London, England.

14. All matters affecting the interpretation of this agreement and the rights of the parties hereto in relation to this agreement shall be governed by the laws of the State of Nevada.

15. The parties have incorporated in this agreement their entire understanding. No oral statement or prior written matter extrinsic to this agreement shall have any force or effect. The parties are not relying upon any representation other than those expressly set forth herein.

16. The parties hereto declare that each has had independent legal advice by counsel of his or her own selection; that each fully understands the facts and has been fully [fol. 24] informed of all legal rights and liabilities as heretofore set forth. That both parties believe the agreement to be fair, just and reasonable and that each signs the same freely and voluntarily.

17. This agreement shall not be construed by anyone as a consent of either of the parties hereto to their separation nor as a condonation by either of any conduct of the other nor as a waiver by either of any right or cause of action or defense arising by reason of the conduct of the other. It is nevertheless understood that divorce proceedings have been instituted by the Wife against the Husband in the Second Judicial District Court of Nevada, in and for the County of Washoe, and that this agreement is executed for the purpose of effecting a settlement of the respective property rights of the parties hereto in the event a divorce should be decreed. This agreement shall be submitted to the court for its approval, but nevertheless the covenants in this agreement shall survive any decree of divorce which may be entered. It is of the essence of this agreement that the settlement herein provided for shall not become operative in any manner nor shall any of the Recitals or covenants herein become binding upon either party unless a decree of absolute divorce between the parties shall be entered in the pending Nevada action. The settlement herein provided shall become immediately effective and operative in the event of and upon the entry of a decree of divorce between said parties in said pending Nevada action. The parties hereto, however, shall proceed as expeditiously as possible to carry into effect the covenants herein, which it is provided are to be performed by either of the parties prior to the entry of the decree as aforesaid.

18. This agreement shall be binding upon and enure fo [fol. 25] the benefit of the heirs, executors, administrators and assigns of the parties hereto.

In witness whereof, the parties hereto have signed this agreement in guadruplicate, at Reno, Nevada, on the 27th day of February, 1943.

Reginald Wright. Cornelia Brady Wright.

(Acknowledgments)

[fol. 26] Schedule "One"

Mrs. Wright owns the following:

1. One of the tapestries, which she is to select. It formerly hung in the dining room of the apartment of the parties at the Pierre Hotel in New York City, New York;
2. Harris and Brady family silver;
3. Mrs. Wright's silverware and personal articles;
4. Silver dressing set marked "C. B.";
5. Silver dressing set marked "A. B. H.";
6. Oval painting of Mrs. Harris;
7. Dinner plates and other plates, most of which are marked "A. B. H." and some with heads of persons on them;
8. Some small pieces of bric-a-brac in New York;
9. One square clock given to her by Mr Horjes;
10. Jewelry, if any;
11. White and gold champagne and wine glasses, including finger bowls marked "A. B. H.";
12. Any and all articles, clocks, ornaments, etc., that were Mrs. Harris' or marked "A. B. H." or "C. B.";
13. Miniatures belonging to Adelaide B. Harris and other articles in London, including five or more jade elephants.

(Some of above are in France and some are in England.)

RW
CBW

[fol. 27] PETITIONER'S EXHIBIT 7

Findings of Fact and Conclusions of Law

No. 73,076. Dept. No. 1

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE

CORNELIA WRIGHT, Plaintiff,

vs.

REGINALD WRIGHT, Defendant

Filed Mar. 6, 11:54 A. M. '43. E. H. Beemer, Clerk, by V. Whitehead, Deputy

The above entitled cause coming on regularly for hearing on the 6th day of March, 1943, before the above entitled Court, the undersigned District Judge presiding, sitting without a jury, a trial by jury having been waived, the plaintiff appearing personally and by her attorney, Geo. A. Bartlett, Esq., and Messrs. Thatcher and Woodburn, and the defendant appearing by his attorney, Lester D. Summerfield, Esq.; and it appearing to the satisfaction of the Court herein that the defendant has appeared in this action and has filed his answer herein to the complaint of the plaintiff, and said action coming on for trial upon the complaint of the plaintiff and the answer of the defendant, and evidence being thereupon introduced in said cause and said cause having thereupon submitted to the Court for its decision, and the Court [fol. 28] being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law, as follows, to-wit:

Findings of Fact

I

That plaintiff is now, and for more than six weeks preceding the filing of the complaint in this action has been a bona fide resident of and legally domiciled in the County of Washoe, State of Nevada; that plaintiff, during all of said time, has been actually present and domiciled in the City of Reno, County and State aforesaid.

II

That the plaintiff and defendant were married at London, England, on the twenty-first day of July, 1924, and ever since have been, and now are, wife and husband.

III

That there are no children the issue of said marriage.

IV

That under date of February 27, 1943, the plaintiff and defendant entered into an agreement and trust agreements forming a part thereof, under the terms of which the parties settled all obligations arising out of their marriage. The Court finds that the payments to be made by the plaintiff to the defendant, as set forth in paragraphs 3 and 8 of said agreement and the trust agreements forming a part thereof, are in discharge of a legal obligation which, because of the marital relationship has been imposed upon the plaintiff.

V

That since the marriage of the parties, defendant has treated plaintiff with extreme cruelty.

[fol. 29] Conclusions of Law

As Conclusions of Law from the foregoing Facts, the Court finds:

I

That the plaintiff is entitled to a decree of divorce herein forever dissolving the bonds of matrimony now existing between plaintiff and defendant, and releasing said plaintiff and defendant, and each of them, from the obligations thereof and restoring said plaintiff and defendant, and each of them to the status of unmarried persons, and granting to said plaintiff an absolute divorce from said defendant.

II

That the agreement and trust agreements forming a part thereof, made and entered into between plaintiff and defend-

ant under date of February 27th, 1943 is entitled to be approved.

Let judgment be entered accordingly.
Done in open court this 6th day of March, 1943.

Edgar Eather, District Judge, Presiding.

[fol. 30] JUDGMENT AND DECREE OF DIVORCE

No. 73,076

Dept. No. 1

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE

CORNELIA WRIGHT, Plaintiff,

vs.

REGINALD WRIGHT, Defendant

Filed Mar. 6 11:54 A. M., '43, E. H. Beemer, Clerk, by V. Whitehead, Deputy

The above entitled cause came on regularly for hearing on this 6th day of March, 1943, before the above entitled Court, the undersigned District Judge presiding, sitting without a jury, a trial by jury having been waived, the plaintiff appearing personally and by her attorneys, Geo. A. Bartlett, Esq., and Messrs. Thatcher and Woodburn, and the defendant appearing by his attorney, Lester D. Summerfield, Esq.; and it appearing to the satisfaction of the Court herein that the defendant has appeared in this action and has filed his answer herein to the complaint of the plaintiff and the said action coming on for trial upon the complaint of the plaintiff and the answer of the defendant, and evidence having been thereupon introduced in said cause, and [fol. 31] the Court having ~~heretofore~~ fully advised in the premises and having duly considered the law and the evidence and having rendered its decision in favor of the plaintiff and against the defendant, and having heretofore filed its Findings of Fact and Conclusions of Law wherein it finds that

plaintiff is entitled to a decree of divorce as hereinafter provided;

Now, therefore, it is hereby ordered, adjudged and decreed that the bonds of matrimony heretofore and now existing between plaintiff and defendant be, and the same hereby are, forever dissolved and declared forever at an end; that the said plaintiff and defendant are each forever released from the obligations thereof and each is hereby restored to the status of an unmarried person, and that the plaintiff be, and she is hereby granted a decree of absolute divorce herein, forever dissolving the bonds of matrimony existing between plaintiff and defendant.

It is further ordered, adjudged and decreed that the agreement and the trust agreements forming a part thereof between the parties under date of February 27th, 1943, a copy of which agreement and the trust agreements forming a part thereof was introduced in evidence in this cause and marked Plaintiff's Exhibit "A", is hereby approved. Notwithstanding the approval of said agreement and the trust agreements forming a part thereof by the Court herein, It is ordered that said agreement and said trust agreements forming a part thereof shall survive this decree.

It is further ordered, adjudged and decreed that the plaintiff pay to the defendant the payments provided for in paragraphs 3 and 8 of said agreement and the trust agreements forming a part thereof.

[fol. 32] It is further ordered, adjudged and decreed that the decree herein entered is absolute and final in all respects and the Court herein divests itself of all power to amend or modify the same in the future without the consent of both of the parties hereto.

Done in open court this 6th day of March, 1943.

Edgar Eather, District Judge, Presiding.

[fol. 33] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1949

No. 62

(Argued November 2, 1949. Decided December 22, 1949)

Docket No. 21224

CORNELIA HARRIS, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

CORNELIA HARRIS, Respondent

Before L. Hand, Swan and Frank, Circuit Judges

On petitions of the taxpayer and the Commissioner to review an order of the Tax Court *in banc*, which assessed deficiencies against the taxpayer for gift taxes for the years 1940, 1941 and 1942, and expunged a deficiency for the year 1943.

[fol. 34] Irwin N. Wilpon, for the taxpayer.
I. Henry Kutz, for the Commissioner.

L. HAND, Circuit Judge:

This cause comes up upon petitions of the taxpayer and the Commissioner to review an order of the Tax Court *in banc*, deciding her liability for gift taxes in the years 1940, 1941, 1942 and 1943. The tax for each of the first three years depends upon the same question: *i. e.* whether bank deposits in United States banks of a non-resident, not a citizen, are excluded from property subject to a gift tax. The Tax Court held that they were not excluded, and taxed the taxpayer accordingly. The tax for the year 1943 was upon payments by the taxpayer to her husband, in performance of an agreement, executed in anticipation of divorce and dependent upon it for its validity, which was

later adopted by the decree. The taxpayer argues that these payments were not "founded upon a promise or agreement," but upon the obligation established by the decree. The Tax Court so held, and expunged the deficiency.

The Taxpayer's Appeal

The estate tax * excludes from taxation, (a) any amount receivable as insurance upon the life of a "non-resident, not a citizen," and (b) "any moneys deposited * * * by or for a non-resident, not a citizen * * * who was not engaged in business in the United States." Section 1000 (b) of the gift tax ** excludes the property of "a non-resident, not a citizen," which was not "situated within the United [fol. 35] States"; but, since deposits in United States banks are so "situated," the taxpayer must, and does, maintain that we should read the exclusion of § 863 (b) into § 1000 (b). Her chief reliance is *Merrill* v. *Fahs*, where the Supreme Court, following its decision in *Estate of Sandford* v. *Commissioner*,*** held that the gift tax, being ancillary to the estate tax, should be read as *in pari materia*. The question in *Merrill* v. *Fahs*,**** was of the meaning of the phrase, "money or money's worth," in the gift tax, which that act carried over from the estate tax, and which in each act excluded property transferred upon such a consideration. In definition of that phrase the estate tax in 1932 provided †† that the relinquishment of marital rights should not be deemed "money or money's worth." The gift tax, passed in the same year, did not incorporate this definition; but the Supreme Court held that it was nevertheless by implication to be read into § 1002. The First Circuit ††† had already held the same way. We of course accept to the full this canon for the interpretation of the gift tax; but, like every other aid in interpretation, it must yield when the text is clearly enough to the contrary, as it is in

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* 863, Title 27, U. S. C.

** § 1000 (b), Title 26, U. S. C.

*** 324 U. S. 308.

**** 308 U. S. 39, 44.

† § 1002, Title 26, U. S. C.

†† § 812 (b), Title 26, U. S. C.

††† *Comm'r* v. *Bristol*, 121 Fed. (2) 129.

the case at bar. We start with the fact that in *Merrill* v. *Fahs, supra*, the court thought that the definition of "money or money's worth," added to the estate tax in 1932 by what is now § 812 (b), was put in only out of abundant caution, which nobody can suppose to be true of the exclusion by § 863 from property situated within the United [fol. 36] States of life insurance policies and bank deposits. Moreover, an analysis of the two statutes confirms the conclusion that the gift tax should not be read to imply § 863.

In 1931 § 303 (d) of the estate tax was in substance the same as § 862 of the present act. It included shares in domestic corporations—§ 862 (a)—and property which the decedent had any power to transfer whether it was situated in the United States when he made the transfer or at his death—§ 862 (b). When the gift tax was drawn in 1932 the first clause of § 303 (d) was lifted verbally and made the next to the last section of the act—§ 531 (b). The exact words were: "Stock in a domestic corporation owned and held by a non-resident shall be deemed property situated within the United States," and they are literally the same as those of the first clause of § 303 (d) with the omission of the word, "decedent," after "non-resident," and the insertion of the word, "situated" after "property." There cannot therefore be the least doubt of the provenience of § 531 (b), now § 1030 (b). The draftsmen omitted the second clause of § 303 (d) and the whole of § 303 (e), now § 863. It was indeed unnecessary to carry over the first clause of § 303 (d) for shares in a domestic corporation were certainly property situated in the United States, but it was necessary to omit the second clause, for that was altogether inapplicable to gift taxes. As to § 303 (d) the draftsmen therefore showed unmistakable evidence of deliberate choice, actuated by a distinction between estates taxes and gift taxes. They also omitted all of § 303 (e)—now § 863—and that omission the taxpayer must, we think, put down to a belief that it would by implication be carried over into the gift tax and be read as an exclusion from § 501 (b), now § 1000 (b). Certainly it is inconceivable that when the draftsmen dealt so deliberately with § 303 (d), taking over a part and leaving the rest, they exercised no deliberate [fol. 37] choice in omitting the whole of the next adjacent —not even section—but subdivision of a section. The taxpayer does not mean to go so far; but her alternative is

equally improbable, for it presupposes that faced with the exclusory section—§ 303 (e)—they did deliberately choose to leave it out, because they assumed that it would be apparent at once that it would be implied. If so, they concerned themselves to repeat what was redundant—the first clause of § 303 (d)—and left to inference what was necessary.

The taxpayer answers that, since the definition which excluded the relinquishment of marital rights from "money and money's worth" was put into § 303 (d) in 1932, there was as much reason in *Merrill* v. *Fahs, supra,** to infer that it should not apply to the gift tax, as there is to infer that § 303 (e) should not apply to the gift tax, for to leave behind the definition showed that deliberate choice or selection on which we are depending. However, it is not true, strictly speaking, that the first clause of § 303 (d) was carried over to the gift tax and the definition was left behind. The definition was added to the section at the same time that the gift tax was passed; and, as a practical matter we should have no warrant for saying that the draftsmen of the gift tax had the addition before them. Be that as it may, even though we do conceive that their failure to transplant the definition into the gift tax was deliberate and presupposed a belief that it was implicit in § 501 (b), certainly there is no ground for extending that hypothesis to cover § 303 (e) which directly contradicts the general language of § 501 (b).

The taxpayer finally argues that we should supply the omission by recourse to the purposes which actuated the exclusion in the estate tax. These were to encourage non-[fol. 38] residents (a) to take out life policies with United States underwriters, and (b) to keep their deposits in United States banks. So far as concerns deposits, it is an obvious answer that any alien who knew that his deposits were subject to a gift tax would withdraw them before making a gift, and the tax would at best catch only the unwary. Not so as to bequests, for no one can foretell when he will die. A stronger argument can be made as to insurance policies. In 1932 the estate tax only excluded the first $40,000 of all policies payable to other beneficiaries than the insured's estate, so that without the second clause of § 303 (e) the estate of a non-resident decedent would have

* 324 U. S. 308.

been taxable upon all policies which he took out in the name of his executor, and upon the excess of all policies over $40,000, of which anyone else was beneficiary. Congress apparently did think that the exclusion of all policies from the estate tax would offer an inducement to nonresidents to take out policies in United States companies; but there is much less reason to suppose that a similar exclusion in the gift tax would have been an equal inducement. The regulation which accompanied the enactment of the gift tax of 1932 provided that only irrevocable transfers of policies should be deemed gifts, and that they should be measured by the surrender value at the time, plus prepaid insurance adjusted to the date of the gift;* and, although the measure of the value of the gift has since then been changed,** that is not important We may therefore concede that it is theoretically possible that a nonresident might be dissuaded from taking out insurance in a United States company because he learned that if, while he lived, he wished to make an irrevocable gift of it, he [~~fol.~~ 39] would be taxed on its surrender value. It is always a dangerous business to fill in the text of a statute from its purposes, and, although it is a duty often unavoidable, it is utterly unwarranted unless the omission from, or corruption of, the text is plain. We should go clean beyond all permissible extrapolation of any declared purpose, if we were to say in the face of this apparently deliberate omission that Congress must have meant to give United States insurance companies what was possibly, nay probably, a trifling and hypothetical advantage. And this conclusion is immensely fortified, when we consider that we cannot separate policies from bank deposits, and that there could not have been any similar purpose as to them. The order is affirmed as to the years 1940, 1941 and 1942.

The Commissioner's Appeal

By agreement between the taxpayer and her husband they mutually exchanged certain rights they had against each other, including the surrender by each of any "share in any capacity whatsoever in the estate of the other party

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* Treasury Regulations 79—Article 2 (5).

** *Guggenheim* v. *Rasquin*, 312 U. S. 254; *U. S.* v. *Ryerson*, 312 U. S. 260.

upon the latter's death." The Tax Court fixed the excess of the value of the property which the taxpayer gave her husband over what he gave her at $107,150.78; and we do not understand that this amount is in dispute, except as to the husband's annuity of $5,000 for ten years, of which more hereafter. The taxpayer having paid this excess in exchange for her husband's relinquishment of all his marital rights in her property on her death, if the agreement had stood alone, there can be no doubt that under *Merrill* v. *Fahs, supra,** a gift tax would have been due. Moreover, although the agreement provided that it shall be "of the essence * * * that the settlement * * * shall not * * * [fol. 40] become binding upon either party unless a decree of divorce shall be entered in the pending Nevada action," the "covenants" which it contained were to "survive any decree of divorce." Thus the question arises whether the payments after decree should be treated as "founded upon a promise or agreement," as required by § 812 (b) (4), or as debts "founded" solely upon the obligation of a judgment for the payment of money.

In *Commissioner* v. *Maresi*** we held that payments which the divorce decree had adopted and to which it added its sanction, were not "founded" upon the promise or agreement, because that had been the settled practice of the Board of Tax Appeals, confirmed by two Courts of Appeal, and because we believed that the contrary conclusion was not so inevitable as to justify overruling that authority. Moreover we went further; we said that § 812 (b) meant "that the legal transaction which creates the obligation is the decree and in that sense the allowances are not 'founded' upon the agreement, but upon the command of the court." We viewed the agreement, whose existence as a contract was conditional upon the entry of the decree, to be no more than a suggested compromise until confirmed, which the court might or might not choose to accept as the measure of the parties' obligations, and which became an obligation only by the decree. The taxpayer says that the record in that case discloses that the agreement, there as here, provided that it should continue to be in force after the decree was entered, and for that reason

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* 324 U. S. 308.

** 156 Fed. (2) 929.

she relies upon this decision as an authority. It is true that the agreement did so provide, but we have examined the opinion of the Tax Court, and the briefs, and in neither was there any mention of that circumstance. The decision stands for no more than that, when the validity of the [fol. 41] settlement is made conditional upon its adoption by the decree, and when it does not by its terms survive the decree, the payments are not "founded" upon the "promise or agreement." *Commissioner* v. *Converse** somewhat more favored the taxpayer, for the divorce court allowed the "lump sum" of $625,000 to the wife, apparently in commutation of the wife's annuity of $15,000 a year, which was a departure from the terms of the settlement. However, it adds nothing to *Commissioner* v. *Maresi* on which it depended as authority. In *Barnard* v. *Commissioner*** the wife paid her husband two sums, each of $50,000; the first, in pursuance of a written agreement which anticipated a decree of divorce, and which provided that the decree should not "affect or in any manner alter the terms and conditions of the agreement." After that payment had been made, a decree of divorce was entered that "ratified, adopted and approved" the "written agreement"; but which said nothing of an oral agreement entered into at the same time as the written one, requiring a second payment of $50,000, which was in fact made after the decree was entered. We held that both sums were taxable, and not even a plausible objection could be raised as to the second, for the decree had not incorporated it, or been necessary to make it valid. We held the first payment taxable, because it was made before there was any decree on which it could have been "founded," and because the agreement had provided that it should survive the decree when it was entered. We can see no inconsistency between this decision and the two earlier ones.

In some jurisdictions contracts, made in anticipation of a divorce, are held to persist *ex proprio vigore* after the divorce decree has incorporated their terms, and has added [fol. 42] its sanctions to those available in contract. That, for example, is the law of New York,*** where the contract

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* 163 Fed. (2) 131 (C. A. 2).

** 176 Fed. (2) 233.

*** *Goldman* v. *Goldman*, 282 N. Y. 296.

remains obligatory even after the court has modified the allowances which it originally adopted; and where the promises will be thereafter enforced by execution and the like. Perhaps, that is also the law of Nevada, which the parties provided should govern "all matters affecting the interpretation of this agreement or the rights of the parties." Be that as it may, in the case at bar, the Nevada decree having declared that the agreement was "entitled to be approved," that included the provision that its "covenants" should "survive" as well as any of its other stipulations. Thus the payments made under it were "founded" as much upon the "promise or agreement" as upon the decree; indeed, they were "founded" upon both; the parties chose to submit themselves to two sanctions—contempt under the divorce court and execution under the contract. The payments were therefore subject to the gift tax.

There only remains the question whether it was proper to include the commuted actuarial value of the husband's annuity at the time when the decree passed. The taxpayer's argument is that the annuity was a series of independent gifts, each maturing when made, and not to be appraised as one. This misconceives the transaction; although the payments were subject to a gift tax, they were not gifts at all, the annuity was a contract made for a valid consideration, and it is classed as a gift only because the statute says so. Once it became a contract by entry of the decree, since thereupon the taxpayer became bound to make all the payments, she did not make a new gift each month; indeed she never had any donative intent at the outset. In dealing with such a series of contractual payments, it has long been the accepted practice to appraise [fol. 43] their present actuarial value as was done in the case at bar; we have nothing to add to what we said on this subject in *Commissioner* v. *Marcsi, supra*,* *City Farmers Trust Co.* v. *Hoey*** concerned an order which did not establish a permanent obligation and which could be changed from time to time as the court saw fit. Finally, any effect which the fourth article of the agreement may have upon the amount of the gift tax, we leave to the Tax Court which did not find it necessary to pass upon it. The

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* 156 Fed. (2) 929.

** 101 Fed. (2) 9 (C. A. 2).

case must be remitted to that court to redetermine the 1943 tax.

The order is affirmed as to the years 1940, 1941 and 1942.

The order is reversed as to the year 1943, and the case remitted for further proceedings in accordance with the foregoing.

SWAN, Circuit Judge:

I am unable to agree with so much of the opinion as affirms the imposition of gift taxes on the bank deposits. Provisions exempting from estate taxes insurance and bank deposits of a non-resident not engaged in business in the United States first appeared in § 403 (b) (3) of the Revenue Act of 1921, 42 Stat. 227. No gift tax was then in force. The purpose of such exemption was to enable American insurance companies and banks to compete with foreign underwriters and banks. Senate Rep. No. 275, 67th Cong. 1st sess. In the Revenue Act of 1924, 43 Stat. 253, the exemption was carried forward as section 303 (e) in the chapter dealing with estate taxes but did not appear in the chapter imposing a gift tax. Unless the exemption were construed to be applicable also to the gift tax the pur- [fol. 44] pose of the estate tax exemption would be frustrated, in part at least. The Revenue Act of 1926, 44 Stat. 1961, repealed the 1924 gift tax and continued the estate tax exemption by section 303 (e). Consequently from 1926 to 1932 American insurance companies and banks were under no disadvantage in competing with foreign concerns for the business of non-resident depositors or applicants for life insurance.

The estate statute and the gift tax statute are *in pari materia* and must be construed together. If Congress had intended by the 1932 Act to deprive the American insurers and banks of advantages they had enjoyed for six years it seems likely that the legislative history would have disclosed such purpose. It does not. I think the literal words of § 1000 (b) should yield to the purpose of the exemption. *Merrill* v. *Fahs*, 324 U. S. 308 inferentially tends to support this conclusion inasmuch as the majority opinion rejects Mr. Justice Reed's view that omission of words from the gift tax which were included in the estate tax indicated Congressional intent to accord the rights involved different treatment.

[fol. 45] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of December, one thousand nine hundred and forty-nine.

Present: Hon. Learned Hand, Chief Judge; Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

CORNELIA HARRIS, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

CORNELIA HARRIS, Respondent

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed as to the years 1940, 1941 and 1942. The order is reversed as to the year 1943, and the cause remitted for further proceedings in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 46] [Endorsed:] United States Court of Appeals, Second Circuit. Cornelia Harris v. Commissioner of Internal Revenue. 62. Judgment. United States Court of Appeals, Second Circuit. Filed Dec. 22, 1949. Alexander M. Bell, Clerk.

[fol. 47] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 48] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1949

No. —

CORNELIA HARRIS, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE

STIPULATION

Subject to the approval of this Honorable Court, it is hereby stipulated and agreed by and between the attorneys for the parties in the above-entitled cause that, for the purpose of the petition for a writ of certiorari, the printed record may consist of the following:

1. The appendix to the brief of the taxpayer in the United States Court of Appeals for the Second Circuit.

2. The proceedings before the United States Court of Appeals for the Second Circuit.

It is further stipulated and agreed that the petitioner will file the entire transcript of the record now on file in the office of the Clerk of the United States Court of Appeals for the Second Circuit with the Clerk of the United States Supreme Court, and that in the event the petition for a writ of certiorari is granted the printed record shall consist of the proceedings in the court below and such portions of the entire transcript of the record certified by the clerk of the United States Court of Appeals for the Second Circuit as the respective parties may designate. It is further agreed [fol. 49] that either party may, in the petition and briefs, refer to any portion of the typewritten transcript of record which is not included in the printed record filed with this Court.

January 11, 1950.

Irwin N. Wilpon, Counsel for Petitioner.

January 12, 1950.

Philip B. Perlman, Solicitor General, Counsel for Commissioner of Internal Revenue.

[fol. 50] [Endorsed:] The Supreme Court of the United States, October Term, 1949. No. —. Cornelia Harris, Petitioner, vs. Commissioner of Internal Revenue. Stipulation.

[fol. 44] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION—Filed April 26, 1950

Subject to the approval of this Honorable Court, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that for the consideration of this case on the writ of certiorari to the United States Court of Appeals for the Second Circuit heretofore granted, the printed record may consist of the following:

1. The appendix to the brief of the taxpayer in the United States Court of Appeals for the Second Circuit.

2. The proceedings before the United States Court of Appeals for the Second Circuit.

3. This stipulation.

It is further stipulated and agreed that the petitioner will file the entire transcript of record now on file in the office of the Clerk of the United States Court of Appeals for the Second Circuit, and it is further agreed that in the briefs for either party reference may be made to any portion of the typewritten transcript of record which is not included in the printed record prepared as aforesaid.

April 24, 1950. Irwin N. Wilpin, Counsel for Taxpayer.

April 20th, 1950. Philip B. Perlman, Solicitor General, Counsel for Commissioner of Internal Revenue, Respondent.

[fol. 44a] [File endorsement omitted.]

[fol. 45] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 27, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, limited to Questions 2 and 3 presented by the petition for the writ.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8087)

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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

No. ~~549~~ 14

CORNELIA HARRIS,

Petitioner,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRWIN N. WILPON,
Counsel for Petitioner.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Regulations Involved	2
Statement	3
Specifications of Error to be Urged	5
Reasons for Granting the Writ	6
Conclusion	21
Appendix	22

CITATIONS

Cases:

Beveridge v. Commissioner, 10 T. C. 915	13
Buaas v. Buaas, 62 Nev. 232	16
Burnet v. Guggenheim, 288 U. S. 280	8
Commissioner v. Barnard, 176 F. (2d) 233, revg. 9 T. C. 61	4, 12, 13, 15
Commissioner v. Bristol, 121 F. (2d) 129	6
Commissioner v. Converse, 163 F. (2d) 131, affg. 5 T. C. 1014	9, 13, 18
Commissioner v. Maresi, 156 F. (2d) 929	17, 18, 19
Commissioner v. Mesta, 123 F. (2d) 986, cert. den. 316 U. S. 695	17

PAGE

Commissioner v. State Street Trust Co., 128 F. (2d) 618 17
Commissioner v. Swink, 155 F. (2d) 723 17
Commissioner v. Wemyss, 324 U. S. 303 .....6, 13
Cunningham v. Cunningham, 61 Nev. 93 16
DeGoldschmidt-Rothschild v. Commissioner, 9 T. C. 325 affd. 168 F. (2d) 975 10

Forstman v. Commissioner, CCH Dec. 15, 619 (M).. 14

Geary v. Commissioner, CCH Dec. 13, 245 (M)..... 14
Gould v. Commissioner, CCH Dec. 15, 894 (M)... 14

Harding v. Commissioner, 11 T. C. 1051 14
Heiner v. Donnan, 285 U. S. 312 7
Hill v. Commissioner, CCH Dec. 14, 974 (M)..... 14

Jones v. Commissioner, 1 T. C. 1207 .....12, 13
Judson v. Commissioner, CCH Dec. 15, 662 (M)..... 14

Lahti v. Commissioner, 6 T. C. 7..... 13
Lasker v. Commissioner, 138 F. (2d) 989..12, 13, 14, 15
Ledyard v. Commissioner, CCH Dec. 15, 087 (M) ... 14
Lewis v. Lewis, 53 Nev. 398 16

McLean v. Commissioner, 11 T. C. 543 14
Merrill v. Fahs, 324 U. S. 308 .....6, 9, 13
Merrill v. Fahs, 142 F. (2d) 651 12
Miller v. Miller, 134 F. (2d) 583, cert. den. 320 U. S. 744 19
Mitchell v. Commissioner, 6 T. C. 159 13
Moore v. Commissioner, 10 T. C. 393 13

Pearson v. McGraw, 308 U. S. 313 .....9, 10

Sanford v. Commissioner, 308 U. S. 39 6
Schact v. Schact, 295 N. Y. 439, revg. 270 App. Div. 850 19

PAGE

Taurog v. Commissioner, 11 T. C. 1016 14

Van Dyke v. Wisconsin Tax Commission, 311 U. S. 605, affg. 235 Wisc. 128 10

Yoke v. Fleming, 145 F. (2d) 472, affg. 53 F. Supp. 552 ..... 16, 17

Statutes:

Internal Revenue Code:
Sections 812 ..... 18, 22
Section 861 7
Section 863 ..... 6, 7, 23
Section 864 7
Section 1000 ..... 6, 7, 23
Section 1002 23

Judicial Code, Section 1254 2
Revenue Act of 1921, Section 403 7
Revenue Act of 1926, Section 302 7
Revenue Act of 1926, Section 303(d) 8
Revenue Act of 1926, Section 303(e) 7, 8
Revenue Act of 1932, Section 804 8
Revenue Act of 1932, Section 805 9
Title 31, United States Code, Section 750 10

Nevada Compiled Laws, Section 9463 ..... 16, 27

Treasury Regulations:
Reg. 108 Section 86.8 23
Reg. 108 Section 86.18 24

Miscellaneous:

E. T. 19, 1946-2 Cum. Bull. 166 ..... 14, 25
H. R. 708, 72nd Cong. 1st Sess. p. 27 8
S. Rep. 275, 67th Cong. 1st Sess. p. 25 7
S. Rep. 665, 72nd Cong. 1st Sess. p. 39 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

CORNELIA HARRIS,

Petitioner,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Cornelia Harris, hereby respectfully requests this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the decision and judgment of that Court which affirmed as to the years 1940, 1941 and 1942 and reversed as to the year 1943 the decision of the Tax Court of the United States.

Opinions Below

The opinion of the Tax Court, *en banc* (R. 4-11), is reported in 10 T. C. 741. The opinions in the Court of Appeals appear at pages 33 and 41 of the record.

Jurisdiction

The judgment of the Court of Appeals was entered on December 22, 1949 (R. 42). The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code (Title 28 United States Code Section 1254; June 25, 1948, c. 646, 62 Stat. 928).

Questions Presented

1. Is Section 863 of the Internal Revenue Code in *pari materia* with Section 1000 (b) and to be construed with it, so that transfers in the years, 1940, 1941 and 1942 of monies of the petitioner, a nonresident alien not engaged in business in the United States, on deposit with an American bank, are not deemed transfers of property situated within the United States for gift tax purposes?

2. Were the transfers made by the petitioner to her husband under a property settlement agreement dated February 27, 1943, incidental to a Nevada divorce, made for an adequate and full consideration in money or money's worth and thus not subject to gift tax?

3. Were the transfers made by the petitioner to her husband in 1943, in payment and discharge of a legal obligation imposed by the judgment of the Nevada Court entered March 6, 1943, and thus not subject to gift tax?

Statutes and Regulations Involved

The pertinent statutes and regulations are set forth in the Appendix, *infra*.

Statement

The petitioner, an American born citizen, had become a British subject by marriage (R. 5). She resided in England from 1903 until she came to the United States on September 20, 1940 (R. 6). While residing in England, the petitioner had several bank accounts with the National City Bank in New York City, which she continued to maintain after she came here (R. 6). The petitioner was never engaged in business in the United States (R. 6).

From September, 1940 to September, 1942, during which period the petitioner was concededly a nonresident alien (R. 6), she transferred $150,126.93 of her monies on deposit with the National City Bank by checks drawn to her husband, Reginald Wright (R. 6). These transfers were determined by the Commissioner to constitute taxable gifts in those years. As to this, the Tax Court, *en banc*, sustained the Commissioner. The Court of Appeals (Judge Swan, dissenting) affirmed.

The petitioner reclaimed her American citizenship in Reno, Nevada, on November 21, 1942 (R. 6). She commenced a divorce action against her husband in Reno, Nevada, which he contested (R. 13). On February 27, 1943, the parties, in Reno, Nevada, entered into an agreement in the pending contested divorce suit (R. 13-26). By the agreement, the parties settled all claims to their separate property and each made certain transfers and assumed certain obligations to the other. The husband received from the wife: the creation of a trust for his lifetime of the income from the wife's remainder interest in a then existing trust (R. 19-20); an assumption by the wife of an indebtedness of $47,650 (R. 19) and the wife's promise to pay him $416.66 a month for ten years (R. 16). The wife received from the husband: the remainder in fee of 21/90

of certain real property (R. 17-18); $2,131.10 in cash resulting from the sale of certain securities (R. 18-19); a discontinuance of a partition suit then pending (R. 18); an assumption of liability on a bond and mortgage on real property in London (R. 22); an indemnification against liability in connection with certain real property in France (R. 22); a release from all claims to any separate property of the wife not transferred in the agreement (R. 21, 22) and a relinquishment by the husband of any right to share in the wife's estate (R. 21).

On March 6, 1943 a judgment of divorce was entered in favor of the petitioner in the Nevada court (R. 30). The Trial Court found that the payments to be made by the wife to the husband under the agreement were in discharge of a legal obligation imposed upon her (R. 28). The judgment approved the agreement and decreed that the specific payments be made by the wife to the husband (R. 31). The decree, by amendment, authorized the wife to reassume her maiden name of Cornelia Harris.

The Commissioner valued the transfers made by the petitioner at $144,281.77. He offset against this the value of the 21/90 share in certain real property and $2,131.10 cash totalling $37,130.99. The Commissioner deemed the other considerations received by the petitioner from her husband not to any extent to be in "money or money's worth" and he therefore determined the difference of $107,150.78 to be a taxable gift. The Tax Court, *en banc*, overruled the Commissioner on the authority of its prior decision in *Barnard* v. *Commissioner*, 9 T. C. 61. The Tax Court did not pass on the other questions in this case which were not present in the *Barnard* case. The Court of Appeals for the Second Circuit reversed the *Barnard* decision of the Tax Court (176 F. (2d) 233) before this case was heard in that Court. In this case, the Court of

Appeals treated the consideration as a relinquishment of marital inheritance rights as in the *Barnard* case (R. 38) and proceeded to determine, adversely to the petitioner, the issue whether the transfers were made under an obligation imposed by the judgment of the Nevada Court. Accordingly, it reversed the decision of the Tax Court.

Specifications of Error To Be Urged

The Court of Appeals erred:

1. In holding that the transfers by the petitioner, a nonresident alien not engaged in business in the United States, to her husband, in the years 1940, 1941 and 1942, of monies of petitioner totalling $150,126.93 on deposit with the National City Bank, were subject to gift tax.

2. In holding that the transfers by the petitioner to her husband as provided in the agreement of February 27, 1943 were not made for an adequate and full consideration in money or money's worth, and were therefore subject to gift tax.

3. In failing to hold that the transfers made by the petitioner to her husband in 1943 were, within the contemplation of the applicable statutes, not founded on a promise or agreement but were made in discharge of a legal obligation imposed by the judgment and decree of the Nevada Court entered March 6, 1943 and therefore not subject to gift tax.

4. In its valuation of the transfers made and the considerations received by the petitioner under the agreement dated February 27, 1943, between the petitioner and her husband.

Reasons for Granting the Writ

1. ***The decision of the Court of Appeals that Section 863 is not in pari materia with Section 1000 (b) is in conflict with applicable decisions of this Court.***

In *Sanford* v. *Commissioner*, 308 U. S. 39, 42, 44, this Court held that the gift tax was enacted as a supplement to the estate tax to prevent avoidance thereof; and that the gift tax was in *pari materia* with the estate tax and that it was necessary to read the gift tax provisions in the light of the related estate tax provisions to ascertain their correct construction.

In *Commissioner* v. *Wemyss*, 324 U. S. 303, 307, this Court said:

> "The section taxing as gifts transfers that are not made for 'adequate and full (money) consideration' aims to reach those transfers which are withdrawn from the donor's estate."

In *Merrill* v. *Fahs* 324 U. S. 308, 313, this Court stated that the two taxes should not be interpreted differently "where obvious reasons do not compel divergent treatment."

In *Commissioner* v. *Bristol*, (C. A. 1), 121 F. (2d) 129, 136, cited with approval in *Merrill* v. *Fahs, supra*, the Court said:

> "The provisions of the revenue act imposing the gift tax have always been interpreted by reference to the complementary estate tax."

This language in the *Bristol* case was "adopted" by the Solicitor General at page 49 of his brief in *Merrill* v. *Fahs, supra.*

With respect to nonresident aliens the estate tax applies only to "property situated in the United States" (Internal Revenue Code Sections 861a, 864a). Section 863 (Appendix, *infra*) is a part of this definition. Similarly the gift tax as to nonresident aliens "shall apply to a transfer only if the property is situated in the United States." (Section 1000(b), Appendix, *infra*). Section 863, under the principle enunciated in the above-cited cases is likewise a part of this definition.

The provision that life insurance policies and bank deposits of nonresident aliens with American firms be not deemed situated within the United States was first enacted in 1921 as Section 403(b). There was then no gift tax. It later, in 1924, became Section 303(e) and is now Section 863. Congress had noted that American companies were being worsted in the competition with foreign companies for nonresident policies and deposits because they were deemed within the United States and subject to its tax laws. The statute was enacted to remove this disadvantage to American companies and banks. (S. Rep. No. 275, 67th Cong. 1st Sess. p. 25.)

In 1926, the gift tax of 1924 was repealed, by a statute which enacted, in the estate tax, Section 302(c) taxing all gifts made within two years prior to death. By virtue of Section 303(e), however, gifts of life insurance policies and bank deposits of nonresident aliens were not subject to tax.

In 1932, this Court, in *Heiner* v. *Donnan*, 285 U. S. 312, declared Section 302(c) unconstitutional. The Court refused, as requested by the Government to sustain the provision as a gift tax (p. 330) and held that even if a gift tax, the limitation to two years prior to death was arbitrary and unconstitutional (p. 331). Congress thereupon enacted the gift tax of 1932 to replace the tax which this Court had struck down. Its drafters stated:

> "The aim in framing this title has been to state with brevity and in general terms the provisions of a substantive character" (H. R. Rep. No. 708, 72d Cong. 1st Sess. p. 27; S. Rep. No. 665, 72d Cong. 1st Sess. p. 39).

The more extensive and detailed definitions, limitations and qualifications of the estate tax statute were accordingly not inserted in the gift tax statute. It was evidently deemed unnecessary to do so because the two statutes were understood to be and were in *pari materia* to be read together. (*Burnet* v. *Guggenheim*, 288 U. S. 280, 286-288.)

There is thus no reason to suppose from the omission of the language of Section 303(e) in the gift tax that Congress intended that *inter vivos* transfers by nonresident aliens of life insurance policies and bank deposits should now be accorded a different treatment. They were not subject to estate tax and no estate tax avoidance was occasioned thereby. The purpose of the gift tax was to close up gaps in the estate tax. There was none here. There is further no reason to assume that Congress intended to now tip the scales of competition in favor of foreign companies and frustrate its design to help American companies by throwing a gift tax on nonresident alien deposits and life policies in the balance.

The majority of the Court of Appeals finds such reason in the fact that a part of another subdivision, (303(d)) of the statute, was included in the gift tax and a part omitted and from this the majority assumes that the drafters must have acted deliberately (R. 35). The majority of the Court fails to explain why a portion of, not another subdivision, but of the *same* subdivision 303(d), which was added by the same drafters to the estate tax by Section 804 of the Revenue Act of 1932, relating to relinquishment of marital rights, was omitted from the simultaneous-

ly enacted gift tax. This is the provision which this Court in *Merrill* v. *Fahs*, *supra*, held nevertheless to be a part of the gift tax, and thus rejected the view of the dissenting opinion in the *Merrill* case (p. 315) that the omission was deliberate. Similarly, the provision included in the estate tax by Section 805 of the Revenue Act of 1932, but omitted from the concomitantly enacted gift tax, including the limitation "when founded on a promise or agreement", was held to be, nevertheless a part of the gift tax statute (*Commissioner* v. *Converse* (C. A. 2), 163 F. (2d) 131, 133).

Tenuous inferences from what was omitted are thus of little force and cannot serve as "obvious reasons to compel divergent treatment." Only a clear and express declaration of intent by Congress to alter its purpose to aid American banks and insurance companies and to depart from its main purpose to reach only those transfers during life which would be taxable under the estate tax at death, could so serve.

2. The holding of the majority of the Court of Appeals that there was a gift tax on transfers of domestic bank deposits of nonresident aliens, but that it could legally be openly and deliberately avoided is in conflict with applicable decisions of this Court.

In *Pearson* v. *McGraw*, 308 U. S. 313, 317, 318, a resident of Oregon desiring to make a gift in trust in contemplation of death sold certain intangibles located in Illinois and purchased federal reserve notes. He then executed, in Oregon, a trust agreement with an Illinois trustee to whom he transferred the federal reserve notes in trust for certain relatives. Shortly thereafter the trustee converted the notes to purchase bonds for the trust. This Court held that this was all part of one integrated and indivisible

transaction which was the transfer in trust of intangibles and that the Oregon tax could not be so avoided.

In *Van Dyke* v. *Wisconsin Tax Commission*, 311 U. S. 605, affirming 235 Wisc. 128, 292 N. W. 313, a Wisconsin resident took liberty bonds owned by him to Chicago and there received silver dollars for the bonds, which he, in Chicago, delivered to trustees who exchanged them for bank credits and proceeded to execute the trust. It was held that the silver dollars when transferred to trustees had a situs at the donor's domicile and were not "located" without the state and were thus subject to Wisconsin gift tax notwithstanding that the donor never intended to bring the silver dollars into Wisconsin.

In *De Goldschmidt-Rothschild* v. *Commissioner*, 9 T. C. 325, 336, decided *en banc*, affd. (C. A. 2) 168 F. (2d) 975, 978, 979, a nonresident alien owned certain domestic stocks and bonds. She desired to make a gift in trust. For such purpose she converted the securities into United States Treasury notes which were, by Section 750, Title 31 United States Code, when owned by nonresident aliens, exempt from any tax in this country. She transferred the Treasury notes by gift in trust to a trustee, who thereafter sold them and reinvested the proceeds in stocks and bonds. The Court held on authority of *Pearson* v. *McGraw*, *supra*, that this was all one transaction designed to make a gift of stocks and bonds and sustained a gift tax thereon.

The majority opinion in the Court of Appeals in this case says:

> "Any alien who knew that his deposits were subject to a gift tax would withdraw them before making a gift, and the tax would at best catch only the unwary" (R. 36).

The Tax Court (10 T. C. 741, 745) held similarly (R. 10).

It seems quite clear that Congress could not have intended to enact so porous a gift tax, and in fact did not intend any gift tax on such deposits and policies at all.

If, as the majority of the Court of Appeals has held, however, Congress enacted a gift tax on bank deposits and life insurance policies of nonresident aliens, then they have a situs here and are taxable "as property situated within the United States."

Clearly, then, a nonresident alien wishing to make a gift of such monies having a situs here and subject to tax here, could not legitimately withdraw them from the bank for that purpose and go with the donee across the border to Canada, Mexico or Cuba, whichever is convenient, there transfer the money to the donee and then recross the border to the United States. Or, more simply even, a nonresident alien could, under such holding, withdraw so much of the funds from the bank as are intended to be given to the donee, and transmit such money to a bank or other agent in a foreign country and then instruct such agent to transmit the funds to the donee.

Similarly, under such holding, a nonresident alien wishing to transfer an American life insurance policy, could, instead of transferring the policy itself, which would be taxable, surrender the policy for the cash surrender value and then transfer the money to the donee in the same manner as above indicated with respect to bank deposits.

Unquestionably, the Commissioner would assess a gift tax on such transactions and under the decisions of this Court, *supra*, he would be sustained. This holding of the Court of Appeals is in conflict with those decisions.

3. The decisions of the Court of Appeals for the Second Circuit in this case and in Commissioner v. Barnard, 176 F. (2d) 233, 235, 236 are in conflict with the decision of the Court of Appeals for the Seventh Circuit in Lasker v. Commissioner, 138 F. (2d) 989, 991 and the decisions of the Tax Court, en banc, in a long line of cases.

A

The first gift tax case involving a postnuptial settlement was *Jones* v. *Commissioner*, 1 T. C. 1207, 1210, 1211. The Tax Court there held, *en banc*, that transfers by the husband to the wife for a relinquishment of her support claims were for an adequate and full consideration in money's worth.

Lasker v. *Commissioner* (C. A. 7), 138 F. (2d) 989, 991, involved a postnuptial settlement in which the husband paid for a release by the wife of marital rights in his property. The agreement expressly provided that it did not release the husband from his obligation to support the wife. The Court held that the payment by the husband, the amount of which was arrived at by bargaining through counsel for the parties, was for an adequate and full consideration in money's worth and not a gift.

In *Merrill* v. *Fahs* (C. A. 5), 142 F. (2d) 651, 654, the Court in holding a relinquishment of marital rights in an antenuptial settlement not to be consideration to any extent for gift tax purposes, distinguished it from a postnuptial settlement. The Court said:

> "We may well concede that in such a case she gives a money value for what she gets. Such is *Lasker* v. *Commissioner* 7 Cir., 138 F. (2d) 989."

The *Merrill* case was affirmed by this Court (324 U. S. 308) which decided it with *Commissioner* v. *Wemyss*, 324 U. S. 303.

This Court in the *Merrill and Wemyss* cases made no reference to postnuptial settlements, nor did it refer to the *Lasker* or *Jones* cases. The Solicitor General in his brief in this Court in the *Merrill* case (p. 27) distinguished the *Lasker* and *Jones* cases as involving postnuptial settlements.

The first case to come before the Tax Court after the decisions of this Court in the *Merrill and Wemyss* cases, *supra*, was *Converse* v. *Commissioner*, decided *en banc*, 5 T. C. 1014, 1015, 1016, affd. on another ground (C. A. 2) 163 F. (2d) 131, 133. The Tax Court said (p. 1016):

> "This Court in the *Wemyss* case, pointed out the difference between that case and the *Jones* case. The two Supreme Court cases just mentioned as well as the *Bristol* case, all dealt with antenuptial agreements. The Supreme Court did not deal with the question which was in the *Jones* case and did not indicate its views on that question. We follow the *Jones* case."

There then followed a series of decisions in which the Tax Court adhered to this position:

Lahti v. *Commissioner, en banc*, 6 T. C. 7, 8, 9;
Mitchell v. *Commissioner*, 6 T. C. 159, 164, 165;
Barnard v. *Commissioner*, 9 T. C. 61, 66, 67 revd. 176 F. (2d) 233;
Moore v. *Commissioner, en banc*, 10 T. C. 393, 397;
The instant case (en banc);
Beveridge v. *Commissioner, en banc*, 10 T. C. 915, 918;

McLean v. *Commissioner, en banc,* 11 T. C. 543, 547, 548;

Taurog v. *Commissioner, en banc,* 11 T. C. 1016, 1020, 1021;

Harding v. *Commissioner, en banc,* 11 T. C. 1051, 1056;

Geary v. *Commissioner,* C. C. H. Dec. 13, 245 (M);

Hill v. *Commissioner,* C. C. H. Dec. 14, 974 (M);

Ledyard v. *Commissioner,* C. C. H. Dec. 15, 087 (M);

Forstman v. *Commissioner,* C. C. H. Dec. 15, 619 (M);

Judson v. *Commissioner,* C. C. H. Dec. 15, 662 (M);

Gould v. *Commissioner,* C. C. H. Dec. 15, 894 (M).

In the face of these Tax Court decisions, the Commissioner retreated somewhat from his position and issued E. T. 19, 1946–2 Cum Bull. 168-169, Appendix *infra,* in which he ruled that to the extent that a postnuptial settlement is for a release of rights of support, it is for an adequate consideration in money or money's worth, but that a release of property or inheritance rights is not such consideration.

In the *Lasker* case, *supra,* however, the agreement specifically provided that the wife did not release her support rights but only her marital property rights. A number of the Tax Court decisions, above-cited, likewise involved settlements of property and inheritance rights.

In *McLean* v. *Commissioner, supra,* 11 T. C. 543, 549, the Tax Court, *en banc,* held, however:

> "We deem the ruling (E. T. 19) invalid in so far as it does not also except transfers made to settle presently enforceable claims."

In *Commissioner* v. *Barnard*, 176 F. (2d) 233, 235, the Court of Appeals for the Second Circuit expressed its disagreement with the decisions of the Tax Court, *en banc*, *supra*, and it also (p. 236) recognized the conflict with and disagreed with the Court of Appeals for the Seventh Circuit in *Lasker* v. *Commissioner*, *supra*. In this case the Court held as it did in the *Barnard* case on this question (R. 38).

B

The Court of Appeals mistakenly stated in this case (R. 38):

> "The taxpayer having paid this excess in exchange for her husband's relinquishment of all his marital rights in her property on her death, there can be no doubt that under *Merrill* v. *Fahs*, *supra*, a gift tax would have been due."

This case closely followed the *Barnard* case in the Court of Appeals. In the *Barnard* case, it was conceded by the taxpayer that such was the only consideration for the transfer. The Court evidently had its ruling in the *Barnard* case in mind when it made the above statement.

In this case the agreement did contain such a provision (R. 21). But, as the petitioner, herself, pointed out in the Court of Appeals, the agreement was to be effective only if a divorce decree was entered in the pending action (R. 24), and a divorced spouse is, in any event, excluded by statutory provisions, which were cited, from any share in the estate of the other. The petitioner specifically stated that she placed no reliance, therefore, on such provision as consideration. In view of this, the above statement by the Court of Appeals is all the more surprising.

The petitioner based her claim of consideration briefly as follows:

When the divorce decree herein was entered on March 6, 1943, Section 9463 of the Nevada Compiled Laws, Appendix, *infra*, provided:

> "In granting a divorce the court *may* award such alimony to the wife and *shall* make such disposition of the community and separate property of the parties as shall appear just and equitable * * * ."[1]

The separate property of the petitioner was worth in excess of one million dollars at that time (R. 7). This property was subject, under the statute, to a division with her husband by the Court in its decree of divorce, and the Court had a duty to make such disposition uncontrolled by any agreement of the parties (*Lewis* v. *Lewis*, 53 Nev. 398, 410, 411; *Buaas* v. *Buaas*, 62 Nev. 232, 235; *Cunningham* v. *Cunningham*, 61 Nev. 93, 95; *Yoke* v. *Fleming*, 53 F. Supp. 552, 554, 555 affd. 145 F. (2d) 472).

With respect to this issue in the contested divorce action, the petitioner, as a consummation of cold bargaining and haggling through counsel, in which she sought to save as much of her separate property as she could, entered into an agreement with her husband, to be submitted to the Court for its approval (R. 24).

What she parted with must be measured against what she saved, which was the bulk of her separate property with respect to which she received a release from her husband (R. 21, 22). She also received other valuable con-

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[1] Subsquently on March 13, 1943, occasioned possibly by criticized distributions by the courts thereunder, the Nevada Legislature amended the statute by striking therefrom the words "and separate" (Ch. 91 p. 117 Laws of 1943).

siderations for what the Court of Appeals terms "the excess"; a discontinuance of the partition action (R. 18), and indemnity with respect to liabilities on certain real properties (R. 22).

Since the agreement was entered into under compulsion of the statute for the purpose of the divorce decree in the pending action, it provided that it should be of no force if no such decree should be entered (R. 24).

The consideration which petitioner received was not, therefore, a release of inheritance rights, but a release from present claims, in this contested divorce suit, to a share in specific separate property of considerable value. This was an adequate and full consideration for what she gave for it, even if unliquidated. (*Commissioner* v. *Mesta*, 123 F. (2d) 986, 988; cert. den. 316 U. S. 695.) But since the Court in its decree found the transfers to be the measure of the petitioner's legal obligation (R. 28) and therefore ordered them made (R. 31), the liability was liquidated by the decree and the discharge thereof was for an adequate and full consideration in money or money's worth.

4. *The decision of the Court of Appeals in this case limiting its prior decision in Commissioner* v. *Maresi*, 156 F. (2d) 929, 930 *renders that case in conflict with Commissioner* v. *State Street Trust Co.* (C. A. 1), 128 F. (2d) 618, 620, 621 *and with Yoke* v. *Fleming* (C. A. 4), 145 F. (2d) 472 affirming 53 F. Supp. 552, 554, 555, *and Commissioner* v. *Swink* (C. A. 4), 155 F. (2d) 723.

In *Commissioner* v. *Maresi*, *supra*, the Court of Appeals for the Second Circuit followed the holdings of the above-cited cases and like decisions of the Board of Tax Appeals to the effect that where a separation agreement is incorporated in a divorce decree, the payments are founded

not upon the agreement, but upon the decree, and therefore, by Section 812(b) of the Internal Revenue Code, Appendix, *infra*, not subject to the requirement of adequate and full consideration in money's worth for estate tax purposes (pp. 930, 931).

In *Commissioner* v. *Converse* (C. A. 2), 163 F. (2d) 131, 133, the Court held this provision in Section 812 (b) to be in *pari materia* with and a part of the gift tax statute and followed the *Maresi* case with respect to a separation agreement approved in a divorce decree.

In this case the Court declined to follow its *Maresi* and *Converse* decisions for the reason that the agreement provided that it should survive the decree (R. 40). The agreement in the *Maresi* case, however, had likewise so provided and the agreement in the *Converse* case had an analagous provision. Confronted with this, the Court of Appeals said that in the *Maresi* case, it had followed "the settled practice of the Board of Tax Appeals, confirmed by two Courts of Appeal, and because we believed that the contrary conclusion was not so inevitable as to justify overruling that authority" (R. 38). The Court of Appeals stated that the fact that the agreement in the *Maresi* case had provided that it should survive the decree had not there been mentioned (R. 38-39). The Court then limited its *Maresi* decision as follows:

> "The decision stands for no more than that, when the validity of the settlement is made conditional upon its adoption by the decree, and when it does not by its terms survive the decree, the payments are not 'founded' upon 'the promise or agreement'" (R. 39).

The agreements in the *Maresi* and *Converse* cases were *separation* agreements which stood on their own and whose validity was not made conditional upon their adoption in

a divorce decree. Indeed, such would not only be a strange provision in a separation agreement, but it would plainly be a self-vitiating provision which would invalidate the separation agreement as against public policy. The agreement in this case was so made conditional, but it was not a separation agreement, but one made for the express purpose of the event of a decree in a pending divorce action.

It seems, therefore, that except for its mistaken assumption in this regard (R. 38), the Court of Appeals would have overruled its *Maresi* decision entirely instead of limiting it. In any event, since separation agreements are not made conditional on divorce, and since the decisions of the Courts of Appeals for the First and Fourth Circuits, *supra*, also involving separation agreements, laid down no such underlying requisite, the Court of Appeals for the Second Circuit is now plainly in conflict with them.

With respect to the question of survivorship, the law is generally, as the Court itself states (R. 39-40), that even in the absence of such a provision, the separation agreement survives the divorce decree. (*Miller* v. *Miller*, 134 F. (2d) 583, 587; cert. den. 320 U. S. 744.) The purpose of such provision in the agreement is merely as an aid in the enforcement of the Nevada decree whose terms are identical with the agreement. (*Schact* v. *Schact*, 295 N. Y. 439, 442, reversing 270 App. Div. 850, 851; see dissenting opinion in Appellate Division.)

Since survivorship of the agreement is thus generally present and the other decisions do not make such exception, the decision of the Court of Appeals is, on this score, likewise in conflict with the Courts of Appeals for the First and Fourth Circuits.

5. ***The questions are of importance in administering the tax laws which have not been but should be settled by this Court.***

A

The immunity from taxation here of domestic life insurance policies and bank deposits of nonresident aliens was created so that American banks and insurance companies in soliciting such business could offer it as an inducement. Under the decision of the Court of Appeals they are now required to trim down their sales talk by qualifying the inducement. The competitive parity with foreign companies which Congress intended, would no longer exist to the reinstated disadvantage of American companies. The volume of such alien business is substantial and the potential consequences to American banks and insurance companies are such that this question should be settled by this Court.

Nonresident aliens are none the less entitled to be apprised if the tax exists and if so whether it is a tax in the usual sense which cannot so readily be avoided or merely a trap for the unwary. If the latter, the tax should not be permitted to smolder in a lower court decision, waiting to scar unsuspecting alien guests invited to leave their money with American banks and insurance companies.

B

Settlements incidental to a separation or divorce are of such frequent occurrence that the tax consequences thereof are of concern to a great portion of the population.

The state of the conflicting decisions is such that no one can say with certainty what is an adequate and full consideration in money or money's worth in a postnuptial

settlement; or, what is the effect of incorporating the agreement in the decree; or of specific findings of legal obligation and orders for payment thereof in the decree; or whether provisions such as making the validity of the agreement conditional upon its approval in the decree or as to survival of the agreement are of controlling force. The publication Tax Barometer, in its comment on the decision in this case, in its issue of December 31, 1949, Vol. 7, No. 5, ¶60, says: "The 2nd Circuit's position on this question is a 'riddle wrapped in an enigma'."

These questions should be settled by this Court.

CONCLUSION

For the foregoing reasons the petition should be granted.

Respectfully submitted,

IRWIN N. WILPON,
Counsel for Petitioner.

February 1950.

APPENDIX

Internal Revenue Code

Section 812

For the purpose of the tax the value of the net estate shall be determined in the case of a citizen or resident of the United States by deducting from the value of the gross estate.

* * * * *

(b) **Expenses, Losses, Indebtedness and Taxes:**

Such amounts:

* * * * *

(3) for claims against the estate,

(4) for unpaid mortgages upon or any indebtedness in respect to property where the value of decedent's interest therein undiminished by such mortgage or indebtedness, is included in the value of the gross estate, and

(5) * * * The deduction herein allowed in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded upon a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth; * * *

For the purpose of this subchapter, a relinquishment or promised relinquishment of dower, curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent, a consideration in money or money's worth.

Section 863

The following items shall not, for the purpose of this subchapter be deemed property within the United States:

(a) **Proceeds of Life Insurance**: The amount receivable as insurance upon the life of a nonresident not a citizen of the United States, and

(b) **Bank deposits**: Any monies deposited with any person carrying on the banking business, by or for a nonresident not a citizen of the United States who was not engaged in business in the United States at the time of his death.

Section 1000

* * * * *

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

Section 1002

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Regulation 108

Section 86.8 Transfers for a consideration in money or money's worth.--Transfers reached by the statute are

not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc. is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

Section 86.18 Situs of property.—The statute imposes a tax upon gifts made by citizens of the United States, residents or nonresidents thereof, and upon those made by residents of the United States whether or not citizens, irrespective of whether the property transferred (real or personal, tangible or intangible) be situated within or without the United States. But gifts by nonresidents of the United States who are not citizens thereof (see Sec. 86.4) are subject to tax only if the property transferred is, at the time of the transfer, situated within the United States.

Real estate, tangible personal property, and the written evidence of intangible personal property which is treated as being the property itself are within the United States if physically situated therein. For example, a bond for the payment of money is not within the United States unless physically situated therein. Stock of a domestic corporation, however, constitutes property within the United States, irrespective of where the certificates thereof are physically located. (See Sec. 1030(b) and Sec. 86.74.)

Intangible personal property the written evidence of which is not treated as being the property itself constitutes property within the United States if consisting of a property right issuing from or enforceable against a resident of the United States or a domestic corporation (public or private), irrespective of where such written evidence is physically located.

E. T. 19, 1946-2 Cum. Bull. 166, 168-169:

Advice has been requested concerning the application of the gift tax to transfers made pursuant to an agreement of the parties incident to a proceeding for divorce or legal separation.

* * * * *

The gift tax is supplementary to the estate tax. It taxes, to a large extent, transfers *inter vivos* which deplete the estate that the donor would otherwise leave at death. Taxability, therefore, under the gift tax of other than commercial transactions is said to be determined by, and to the extent of, absence of financial benefit to the transferor. (*Commissioner* v. *Wemyss*, supra; section 1002, supra.) Under a decree of divorce or legal separation a husband's duty to support a divorced wife (alimony) customarily lasts only during the joint lives of the parties or until the divorced wife remarries. (Vernier, "American Family Laws," Volume II, 1932 and Supp. 1938.) The fulfillment, therefore, of this obligation by the husband merely amounts to the liquidation of a presently existing obligation, the satisfaction of which does not have the effect of diminishing or depleting the husband's estate to any greater extent than the payment of other existing legal obligations. On the other hand, a transfer to a wife under such a decree in settlement of inheritance rights is a present transfer of what would otherwise constitute a major portion of the husband's estate on death.

The construction spelled out in section 812 (b), supra, governs the interpretation of the phrase "adequate and full consideration in money or money's worth" as that phrase is used in section 1002 of the Internal Revenue Code. (*Merrill* v. *Fahs*, supra.) The consideration for a transfer by way of property settlement other than relinquishment by the wife of her right to support and maintenance is the relinquishment by the wife of her marital rights in the husband's property or estate and falls squarely within the statutory provisions. Section 812 (b), however, makes no specific reference to support rights. It is the view of the Bureau that the surrender of support rights is not one of the "other marital rights" referred to in the section. The cases of *Meyer's Estate* v. *Helvering* (C. C. A. 2, 1940) (110 Fed. (2d), 367, certiorari denied, 310 U. S. 651) and *Helvering* v. *United States Trust Co. et al.* (C. C. A. 1940) (111 Fed. (2d), 576) will no longer be followed to the extent that they hold that the right of a divorced wife to support from a former husband during the joint lives of the parties is a marital right in his property or estate.

With respect to transfers made pursuant to legal separation agreements or divorce decrees, it is the position of the Bureau that, for both estate and gift tax purposes, a release of support rights may constitute a consideration in money or money's worth. Accordingly, to the extent that a transfer does not exceed the reasonable value of the support rights of the wife it is to be treated as made for an adequate and full consideration in money or money's worth. The question whether the transfer is in excess of reasonable support rights is for the determination of the Bureau. That portion of any transfer which is allocable to the release by the wife of her property or inheritance rights is to be considered as not made "to any extent" for an adequate and full consideration in money or money's worth.

* * * * *

Nevada Compiled Laws, Section 9463 (as it read on March 6, 1943):

In granting a divorce the court may award such alimony to the wife and shall make such disposition of the community and separate property of the parties as shall appear just and equitable, having regard to the respective merits of the parties and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens, if any, imposed upon it for the benefit of the children. In the event of the death of either party, or the subsequent remarriage of the wife all alimony awarded by the decree shall cease, unless it shall have been otherwise ordered by the court.

If after the filing of the complaint, it shall be made to appear probable to the court or the judge in vacation that either party is about to do any act that would defeat or render less effectual any order which the Court might ultimately make concerning the property or pecuniary interests, an order shall be made for the prevention thereof, to be enforced as such preliminary orders are enforced respecting children.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 14

CORNELIA HARRIS, PETITIONER

—VS.—

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

IRWIN N. WILPON,
Counsel for Petitioner.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes and Regulations Involved	2
Statement	2
Specification of Errors Assigned	5
Summary of Argument	6
ARGUMENT:	
I. The transfers made by the petitioner to her husband as provided in the agreement of February 27, 1943 were made for an adequate and full consideration in money or money's worth and are therefore not subject to gift tax	14
II. The transaction herein was a business transaction, at arm's length and free from donative intent and must therefore be deemed to be for an adequate and full consideration in money or money's worth	36
III. The transfers made by the petitioner to her husband in 1943 were in payment and discharge of a legal obligation imposed by the judgment of the Nevada court entered March 6, 1943, and were therefore not subject to gift tax	42
Conclusion	78
Appendix	79

PAGE

CITATIONS

CASES:

Albrecht, Matter of, 118 Misc. (N. Y.) 737, 119 Misc. 554 28

Barnard, Estate of v. Commissioner, 9 T. C. 61, revd. 176 F. 2d 233 ..... 21, 22, 23, 24, 38
Beveridge v. Commissioner, 10 T. C. 915 ..... 21, 41
Bingham's Trust v. Commissioner, 325 U. S. 365 .. 39
Buaas v. Buaas, 62 Nev. 232 ..... 29, 44

Commissioner v. Barnard, Estate of, 176 F. 2d 233, revg. 9 T. C. 61 ..... 24, 26, 27, 54
Commissioner v. Bristol, 121 F. 2d 129 ..... 14, 59, 60
Commissioner v. Converse, 163 F. 2d 131, affg. 5 T. C. 1014 ..... 11, 52, 56, 58, 60, 72, 73, 74, 75, 76
Commissioner v. Maresi, 156 F. 2d 929 ..... 49, 51, 60, 71, 72, 73, 74, 75, 76, 77
Commissioner v. Mesta, 123 F. 2d 986, cert. den. 316 U. S. 695 34
Commissioner v. State Street Trust Co., 128 F. 2d 618 49, 76, 77
Commissioner v. Swink, 155 F. 2d 723 49
Commissioner v. Wemyss, 324 U. S. 303 ..... 19, 20, 38, 39, 59, 60
Converse v. Commissioner, 5 T. C. 1014, affd. 163 F. 2d 131 ..... 20, 21
Cunningham v. Cunningham, 61 Nev. 93 29

Dobson v. Commissioner, 320 U. S. 489 39

Ensign, Matter of, 103 N. Y. 284 28
Fahs v. Merrill, 142 F. 2d 651, revg. 51 F. Supp. 120 affd. 324 U. S. 308 ..... 18, 19
Fleming v. Yoke, 53 F. Supp. 552, affd. 145 F. 2d 472 24, 49
Forstmann v. Commissioner, CCH Dec. 15, 619 (M) 22
Frank v. Commissioner, 51 F. 2d 923 20

Gould v. Commissioner, CCH Dec. 15, 894 (M) ... 22

Harding v. Commissioner, 11 T. C. 1051 21
Herrick v. Herrick, 319 Ill. 146 66
Hesslein v. Hoey, 91 F. 2d 954, cert. den. 302 U. S. 756 60
Hill v. Commissioner, CCH Dec. 14, 974 (M) 21
Hooker v. Commissioner, 174 F. 2d 863 56
Hoyt v. Hoyt, 265 App. Div. 223, leave to appeal den. 290 N. Y. 931 ..... 62, 63

Jones v. Commissioner, 1 T. C. 1207 ..... 14, 20, 24, 36
Judson v. Commissioner, CCH Dec. 15, 662 (M) .. 22

	PAGE
Keller, Estate of v. Commissioner, CCH Dec. 12, 411 H	48
Knabe v. Knabe, 176 Md. 606	66
Krause v. Yoke, 89 F. Supp. 91	55, 56
Lahti v. Commissioner, 6 T. C. 7	21
Lasker v. Commissioner, 138 F. 2d 989	17, 20, 24, 37
Ledyard v. Commissioner, CCH Dec. 15, 087 (M)	21
Lewis v. Lewis, 53 Nev. 398	29, 44, 66
Mason's Estate v. Commissioner, 43 BTA 813	48
McLean v. Commissioner, 11 T. C. 543	8, 21, 25
Merrill v. Fahs, 324 U. S. 308	19, 20, 24, 56, 57, 58, 59, 60
Miller v. Miller, 134 F. 2d 583, cert. den. 320 U. S. 744	61
Mitchell v. Commissioner, 6 T. C. 159	21, 41
Moore v. Commissioner, 10 T. C. 393	21, 54
Ross v. Commissioner, CCH Dec. 10, 988 A	48
Sanford v. Commissioner, 308 U. S. 39	59
Schacht v. Schacht, 295 N. Y. 439, revg. 270 App. Div. 850	62, 63, 65
Taurog v. Commissioner, 11 T. C. 1016	21
Wemyss v. Commissioner, 2 T. C. 876, revd. 144 F. 2d 78, revd. 324 U. S. 303	19
Williams v. First National Bank, 216 U. S. 582	41
Yoke v. Fleming, 145 F. 2d 472, affg. 53 F. Supp. 552	44, 49, 77
Yost v. O'Malley, 88 F. Supp. 626	20
Young v. Commissioner, 39 BTA 230	48
STATUTES:	
Administrative Estates Act of 1925 (15 Geo. 5c 23)	
Halisbury's Laws of England (2d Ed.) Vol X sec. 837	28
Internal Revenue Code:	
Section 812	7, 8, 11, 12, 13, 20, 24, 25, 47, 58, 69, 70, 71, 75, 79
Section 1000	52, 79
Section 1002	52, 80
Section 1141	39
Revenue Act of 1926 Section 303	20, 47, 57, 58
Revenue Act of 1932 Section 804	20, 57
Revenue Act of 1932 Section 805	47, 57

	PAGE
Judicial Code, Section 1254	1
Nevada Compiled Laws, Section 9463	8, 28, 30, 42, 45, 56, 69, 77, 83
New York Decedent Estate Law (McKinney's Consolidated Laws of New York Ch. 13) Section 87	27
Treasury Regulations:	
Reg. 108 Section 86.2	80
Reg. 108 Section 86.8	7, 10, 36, 80
Miscellaneous:	
E. T. 19, 1946—2 Cum. Bull. 166	8, 9, 25, 35, 81
H. Rep. 708, 72d Cong. 1st Sess. p. 47	57
H. Rep. 708 72d Cong. 1st Sess. p. 48	11, 47, 58
S. Rep. 665, 72d Cong. 1st Sess. p. 50	57
S. Rep. 665, 72d Cong. 1st Sess. p. 51	11, 47, 58
2 Paul, Federal Estate and Gift Taxation (1942 Ed.) p. 962	60

IN THE

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No. 14

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—VS.—

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 24, 28) is reported in 178 F. 2d 861, 864. The opinion of the Tax Court (R. 3, 9) is reported in 10 T. C. 741, 746.

Jurisdiction

The judgment of the Court of Appeals was entered on December 22, 1949 (R. 33). The petition for a writ of certiorari was filed on February 11, 1950, and was granted on March 27, 1950 (R. 36). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

Questions Presented

1. Were the transfers made by the petitioner to her husband under a property settlement agreement dated February 27, 1943, incidental to a Nevada divorce, made for an adequate and full consideration in money or money's worth and thus not subject to gift tax?

2. Were the transfers made by the petitioner to her husband in 1943, in payment and discharge of a legal obligation imposed by the judgment of the Nevada court entered March 6, 1943, and thus not subject to gift tax?

Statutes and Regulations Involved

The pertinent statutes and regulations are set forth in the Appendix, *infra,* pages 79-83.

Statement

The petitioner, an American born citizen, had become a British subject by her first marriage in 1903 (R. 4). She married Reginald Wright, a British subject, in 1924 (R. 4). She reclaimed her American citizenship in Reno, Nevada, on November 21, 1942 (R. 5). The petitioner separated from her husband, Reginald Wright, in August 1942 (R. 5). She thereafter commenced an action for divorce against her husband, in Reno, Nevada, which he contested (R. 11, 20). On February 27, 1943, during the pendency of this contested divorce suit (R. 11), the petitioner and her husband, in Reno, Nevada, entered into an agreement (R. 10-19), negotiated through counsel (R. 18), in which they settled all litigated claims to the separate property of each other and pursuant to which each made certain transfers and assumed certain obligations to the other. The

husband received from the wife: the creation of a trust for his lifetime of the income from the wife's remainder interest in a then existing trust (R. 15); an assumption by the wife of an indebtedness of the husband of $47,650 (R. 15) and the wife's promise to pay him $416.66 a month for ten years (R. 13). The wife received from the husband: the remainder in fee of 21/90 of certain real property (R. 14); $2,131.10 resulting from the sale of certain securities (R. 14); a discontinuance of a partition suit then pending (R. 14); an indemnification from and assumption by the husband of all liability on a bond and mortgage on certain real property in London, England and an indemnification against liability in connection with certain real property in Biarritz, France (R. 17); certain personal property in the possession of the husband and the assumption by the husband of payment of the unpaid bills in connection with such personal property (R. 16). The parties released each other from any claim to the separate property of the other not referred to or transferred in the agreement (R. 17). The parties provided that, "this agreement is executed for the purpose of effecting a settlement of the respective property rights of the parties hereto in the event a divorce should be decreed. This agreement shall be submitted to the Court for its approval, but nevertheless the covenants in this agreement shall survive any decree of divorce which may be entered. It is of the essence of this agreement that the settlement herein provided for shall not become operative in any manner nor shall the recitals or covenants herein become binding upon either party unless a decree of absolute divorce between the parties shall be entered in the pending Nevada action" (R. 18).

A trial of the contested divorce suit was had in the District Court of Washoe County, Nevada on March 6, 1943 (R. 20). Both sides appeared by counsel and evidence was

introduced upon the issues joined by the pleadings (R. 20). The court after such trial found "that since the marriage of the parties, the defendant has treated the plaintiff with extreme cruelty" (R. 21). The court further found that on February 27, 1943, the parties entered into an agreement under which they settled all obligations arising out of their marriage and that the payments to be made by the wife to the husband under the agreement were in discharge of a legal obligation imposed upon her (R. 21). The court, accordingly, concluded that the wife was entitled to a decree of absolute divorce (R. 21) and that the agreement of February 27, 1943 was entitled to be approved (R. 21, 22). The judgment and decree of divorce entered March 6, 1943, approved the agreement and specifically adjudged and ordered that the wife pay to the husband the specific payments provided for therein (R. 23). The decree, by amendment, authorized the wife to reassume her maiden name of Cornelia Harris (Typewritten transcript p. 235).

The Commissioner determined that the value of the property transferred by petitioner to her husband exceeded that transferred by him to her by the amount of $107,150.78.[1] He valued the transfers made by the petitioner at $144,281-.77, and offset against this the value of the 21/90 share in certain real property and $2,131.10 cash totalling $37,130.99. The Commissioner deemed the other considerations received by the petitioner from her husband not to any extent to be "adequate in money or money's worth". The gift

[1] In his original deficiency notice the Commissioner had fixed this alleged excess as $117,903.03. However, by stipulation in the Tax Court (Typewritten Tr. p. 255) this was reduced by the Commissioner to the above amount. The original deficiency notice also assessed other gift taxes for the years 1940 to 1945 inclusive. By said stipulation, the deficiencies for the years 1944 and 1945 were eliminated entirely and the deficiencies for the years 1940 to 1943 were eliminated in part.

tax deficiency assessed thereon is approximately $28,000.[2] After the Commissioner had eliminated a number of the items of his deficiency notice by stipulation in the Tax Court, there remained two controverted issues. One involved this deficiency in gift tax for the year 1943; the other involved deficiencies in gift tax for the years 1940, 1941 and 1942. The Tax Court, *en banc*, overruled the Commissioner with respect to the deficiency for the year 1943, involved herein, and sustained the Commissioner with respect to the years 1940, 1941 and 1942. The Court of Appeals (Judge Swan, dissenting) affirmed the Tax Court with respect to the years 1940, 1941 and 1942 and unanimously reversed the Tax Court with respect to the year 1943 involved herein. With respect to the year 1943 the Court of Appeals (R. 31, 32) remitted to the Tax Court the question of the reduction of the valuation of the promise to pay $416.66 a month for ten years by the amount of the income tax thereon under paragraph 4 of the agreement (R. 13). The petition for certiorari herein sought to review the entire judgment of the Court of Appeals. The order of this Court allowed certiorari, limited to Questions 2 and 3 presented by the petition for the writ (R. 36) which relate to the year 1943 only and are the Questions presented *supra*.

Specification of Errors Assigned

The Court of Appeals erred:

1. In holding that the transfers by the petitioner to her husband as provided in the agreement of February

[2] The petitioner, after filing her petition in the Tax Court, paid the tax assessed in the deficiency notice to stop the running of interest thereon. For this reason, the decision of the Tax Court (R. 10) finds overpayments of gift tax for the years 1940 to 1945 inclusive.

27, 1943 were not made for an adequate and full consideration in money or money's worth, and were therefore subject to gift tax.

2. In failing to hold that the transfers made by the petitioner to her husband in 1943 were, within the contemplation of the applicable statutes, not founded on a promise or agreement but were made in discharge of a legal obligation imposed by the judgment and decree of the Nevada court entered March 6, 1943 and therefore not subject to gift tax.

Summary of Argument

The transfers made by the petitioner to her husband in 1943, incidental to the decree of divorce, were made for an adequate and full consideration in money or money's worth, and were in any event, excepted by the applicable statutes from such requirement that they be for an adequate and full consideration, and are not, therefore, subject to gift tax.

The grounds upon which it is urged that the transfers by petitioner to her husband were made for an adequate and full consideration in money or money's worth are:

a. Transfers made in an arm's length divorce settlement, even where solely in consideration of a relinquishment of marital rights, are for an adequate and full consideration in money or money's worth. So the Tax Court has held in a long line of cases.

b. In this case, the transfers by petitioner were made, not for a relinquishment of marital rights, but in discharge of a legal obligation, imposed on her by a Nevada statute, to make, in the divorce suit, a division of her separate

property with her husband, and such transfers were, therefore, for an adequate and full consideration.

The grounds upon which the transfers are excepted from and deemed to satisfy the requirement that they be for an adequate and full consideration in money or money's worth are:

a. The settlement herein of an issue in litigation in the divorce suit is a business transaction which is bona fide, at arm's length and free from any donative intent, as set forth in Treasury Regulation 108, Section 86.8 and the holding and finding of the Tax Court to such effect is correct and should be sustained.

b. The transfers were made by petitioner in satisfaction and discharge of a liability imposed by law by the judgment and decree of the Nevada court and are thus, under the provisions of the gift tax statute, which is in *pari materia* with Section 812 b (5) of the Internal Revenue Code, dealing with the estate tax, not subject to gift tax.

1. A postnuptial settlement in which estranged spouses dealing at arm's length, incidental to a divorce, mutually discharge and release their property and marital rights, contains no element of a gift and Congress had no intent, by the gift tax statute, to subject transfers made for a relinquishment of postnuptial and matured marital rights to gift tax. So the Tax Court has consistently held in a series of cases. The Tax Court has taken the realistic view that, in these postnuptial settlements, each party is seeking to make the most profitable deal possible and to grudgingly yield as little as possible in payment for the relinquishment of the marital and property laims of the other. Therefore, what is given for such relinquishment, as a result of such arm's length bargaining, is an adequate and full consideration therefor.

The Commissioner has, himself, been compelled to concede the correctness of the Tax Court's realistic interpretation of the intent of Congress. Thus, the Commissioner has sought to assess a gift tax on transfers made, pursuant to postnuptial settlements, in satisfaction and relinquishment of the right of support. The Tax Court overruled the Commissioner, as above stated. After a number of such reverses in the Tax Court, the Commissioner issued E. T. 19, 1946-2 C. B. 166, in which ruling he conceded that although it has been judicially determined that the right of support is a marital right, it is not one of the "other marital rights" contemplated by Congress in Section 812 b, but that a transfer in settlement of property or inheritance rights is such other marital right. The Tax Court, however, held that, upon divorce, such rights were transformed into presently enforceable claims and that the ruling (E. T. 19) was invalid insofar as it did not also except transfers made to settle them. (*McLean* v. *Commissioner*, 11 T. C. 543, 549.)

2. The petitioner did not make the transfers herein for a relinquishment of marital inheritance rights by her husband, but in satisfaction of her legal obligation to make a division with her husband of their separate property.

A contested divorce suit was pending between petitioner and her husband in the Nevada court. Section 9463 of the Nevada Compiled Laws then provided that in such divorce action, in granting a divorce, the court was required to make a just and equitable disposition of the separate property of the parties. One of the litigated issues in said divorce suit was such property division. Petitioner's separate property was then worth in excess of one million dollars (R. 5). This property was subject to a division with her husband by the court in its decree of divorce. With

respect to this litigated issue in the contested divorce suit, the petitioner, as a consummation of cold bargaining and haggling through counsel, in which she sought to save as much of her separate property as she could, entered into an agreement with her husband, to be submitted to the court for its approval. In this agreement petitioner parted with a small portion of her separate property in satisfaction of her husband's claim against all of it and thus saved, from the assault of her husband in the litigation, the bulk of her separate property with respect to which she received a release from her husband (R. 16, 17). Since the agreement was entered into, under compulsion of the statute, for the purpose of the divorce decree in the pending action it provided that it should be of no force or effect if no such decree should be entered (R. 18).

The transfers provided in the agreement to be made by the petitioner to her husband were found by the Nevada court in its decree to be the measure of the discharge of such legal obligation of the petitioner (R. 21) and the court therefore ordered petitioner to make them (R. 23).

The transfers thus made by the petitioner in discharge of such legal obligation under the statute and judgment are therefore analogous to transfers made by a husband in discharge of the legal obligation of support, which the Commissioner in E. T. 19 concedes to be a consideration in money or money's worth therefor. Transfers made to discharge such legal obligations are made for an adequate and full consideration in money or money's worth and are not gifts.

3. The Tax Court, consonant with its realistic view of such transactions, holds divorce property settlements made at arm's length without donative intent to be business

transactions, as contemplated by Treasury Regulation 108, Section 86.8, since they are calculated deals for profit in which each party is warily negotiating either to save or to obtain as much as possible in satisfying the claims and obligations of the other. Thus, in this case, the parties dealt with the disposition of specific claims to specific property and with specific business transactions in which they had engaged during their marriage. For example, both parties had contributed to the purchase price of certain business real property located on Fifth Avenue, in New York City (R. 12) which purchase was clearly a business transaction. Plainly, in settling their disputed claims to this property and in disposing of it, they were likewise engaging in a business transaction. The same is true with respect to the negotiations concerning the discharge of the note of $47,650 held by the bank (R. 15) and the disposition of the securities held by the bank as collateral (R. 14) and the discontinuance of the partition suit (R. 14) and the assumption of liabilities with respect to the foreign real properties (R. 17). These were plainly business transactions which were bona fide, at arm's length and without donative intent.

Furthermore, a bona fide settlement at arm's length, through counsel, of a genuinely litigated controversy is a calculated transaction for profit on both sides and is a business transaction. Thus, a bona fide settlement of a litigated claim would not subject the parties to inquiry as to whether one had paid too much or the other had released his claim for too little, and had thus, to the extent of the unfavorable balance, incurred, in addition, a liability to gift tax.

So here, by statute, one of the litigated issues in the contested divorce suit was that of a disposition of separate

property between the petitioner and her husband. The parties negotiated an arm's length settlement through counsel of the litigated claims which would have to be tried. Congress never intended that the Commissioner should weigh the transaction to determine whether it was equal on both sides, on the penalty that the party who might be said to have been bested in the negotiations be held to have thereby made a gift to the other to the extent that he had been outbargained.

4. Section 812 b of the Internal Revenue Code, dealing with the estate tax, which is in *pari materia* with the gift tax statute (*Commissioner* v. *Converse*, 163 F. 2d 131), requires transfers in satisfaction of liabilities founded merely on a promise or agreement to be for an adequate and full consideration in money or money's worth. This is a clarifying provision, inserted by amendment to the statute, to render it definite that such requirement is limited to liabilities founded merely on contract and does not apply to liabilities "imposed by law or arising out of torts." (H. Rep. No. 708, 72d Cong. 1st Sess. p. 48; S. Rep. No. 665, 72d Cong. 1st Sess. p. 51.)

Under this provision of Section 812 b, the question arose whether transfers in satisfaction of a liability created by a separation agreement which had been incorporated in a divorce decree were in satisfaction of claims founded on a promise or agreement or upon a liability imposed by the decree of the court. The Board of Tax Appeals, the Tax Court and the Courts of Appeals for the First, Second and Fourth Circuits uniformly held that where the divorce court had the power to disregard the agreement and make its own provision, the provision was the court's and the liability was founded on the decree of the court and not on the agreement, even though the court might have adopted the provisions of the agreement.

In this case, the Court of Appeals declined to follow those decisions, because the agreement provided that it should survive the decree. The Court of Appeals held that by reason thereof the liability was founded on both the agreement and the decree and was subject to gift tax. The Court of Appeals thus gave a wholly unwarranted effect to a purely incidental provision in the agreement. This provision was inserted merely as an aid in enforcing the decree whose provisions were identical with those of the agreement. The decree controls and fixes the rights and obligations of the parties. These rights and liabilities cannot be vacated or modified by cancelling or modifying the agreement, but resort must be had to the court to vacate or modify the decree. If the terms of the decree conflict with the terms of the agreement, the decree controls. So far as the agreement has the same provisions as the decree, it may, by this provision, be resorted to as a convenience in enforcing the provisions of the decree.

The purpose of Section 812 b was to apply the requirement of adequacy of consideration where the liability rested on a mere agreement and had no other foundation to support it. But where the liability was imposed by law under a judgment of a court which measured and adjudicated it, the Congressional intent was that such measurement be accepted and that the requirement of adequacy of consideration shall not apply but shall be presumed to have been met. Here, the court adjudicated the liability of the petitioner and entered a valid and binding judgment therefor against her.

In a matrimonial litigation the parties could not by agreement assess their respective liabilities to each other. Only the court could do so in its decree. The agreement was merely a negotiated accord which the parties sub-

mitted to the court, which the court could approve or reject, wholly or in part. The Court of Appeals erroneously holds that in so providing for survivorship in such submitted accord, the parties deprived the decree of the effect accorded it under Section 812 b, even though the force or validity of the judgment is in no way diminished or impaired by the agreement. The Court of Appeals does not hold that the liability of the petitioner is not founded on the decree. The court concedes that it is, and thus, necessarily, it is exempted, by the terms of Section 812 b, from the requirement of adequate and full consideration. The Court of Appeals says, however, that the liability is, in addition, founded upon the agreement and therefore utters the paradox, that by having too much foundation, the parties have too little. The liability does not rest on the agreement but on the decree which is the source of it. But, at the very worst, any other foundation than that of the decree, which is conceded, may be disregarded as surplusage. The parties went beyond the foundation of an agreement. If they had rested on the agreement, assuming that they could so rest without submitting the agreement to the court, they would have been required to establish that the liability was created for an adequate and full consideration. But the parties went further, as they were required to do under the law of Nevada. They obtained an assessment of their liabilities from the court by a valid and binding judgment whch specifically created the liability of the petitioner. They therefore satisfied the expressed intent of Congress in Section 812 b that where the liability is imposed by such a judgment, that the judgment be accepted as the full measure thereof.

ARGUMENT

I

The transfers made by the petitioner to her husband as provided in the agreement of February 27, 1943 were made for an adequate and full consideration in money or money's worth and are therefore not subject to gift tax.

A.

The first case involving a postnuptial settlement was *Jones* v. *Commissioner*, 1 T. C. 1207, *en banc* (1943), pet. for rev. dism. (C. A. 7th), May 1, 1944. There, the taxpayer entered into an agreement with his wife, incidental to a Nevada divorce, in which they made a settlement of the wife's right of support. The Commissioner assessed a gift tax on the transfers made by the husband in such settlement. The Commissioner relied on the case of *Commissioner* v. *Bristol* (C. A. 1, 1941), 121 F. 2d 129 in which it was held that in an antenuptial settlement, the relinquishment of dower was not a consideration in money or money's worth for gift tax purposes. The Tax Court distinguished between antenuptial and postnuptial settlements and held at p. 1210:

> "The *Bristol* case involved an antenuptial contract under which payment was made for the release of dower rights. The contested payment here occurred in satisfaction of the wife's right to support by her husband as an incident of their divorce. There may be some ground for argument that prior to or during marriage, where no divorce is contemplated, the inchoate right of dower which may never be realized is too uncertain and indefinite to be thus measured in

terms of money. Moreover, in those cases the circumstances are frequently such that there may well be a definite donative intent in the transfer. The contract there may be to effect a mere family arrangement. The parties are manifestly not dealing at arm's length and the purpose to exact a *quid pro quo* may be lacking. It is a far cry, however, from such a transaction to that presented in the record, where the transfer was a settlement of a present and existing liability. Here the estranged husband and wife were taking steps to secure a divorce and a settlement was made of the wife's right of support. There was no inchoate or indefinite right, the value of which was to be ascertained. The wife possessed not only a right to support by her husband, but she was entitled to have the court determine the value of that right and set aside its amount from her husband's estate, unless the parties themselves did so by agreement. By the Nevada Compiled Laws of 1929 section 3361, curtesy and dower are abolished in that state a d by section 9463, the court in its discretion, is given authority in case of divorce to make proper provision for the support and maintenance of the wife from the husband's estate. Had the payment here been made under a specific award in the divorce decree of the court, there could scarcely have been a claim that it was a gift. See Walter S. Hallwell, 44 B. T. A. 740; reversed 139 Fed. (2d) 642; certiorari denied—U.S.—(May 4, 1943). But respondent does not go so far. He contends that in view of the fact that the parties negotiated a settlement and consequently asked no specific award by the court, the transaction takes on an entirely different character and is a voluntary transfer by the husband in settle-

ment for release of rights to which no value in money could be ascribed.

We do not agree. In either case, whether under award by the court or by agreement between the parties, an existing legal liability on the part of the husband to the wife was settled. The mere form of the transaction under which that liability is satisfied is not controlling. The husband and wife here, acting through their respective attorneys, negotiated a settlement of the wife's right to maintenance and support. The settlement was unquestionably an arm's length transaction for consideration, with no suggestion of donative intent or purpose. *Hensley* v. *Hensley*, 179 Cal. 284, 183 Pac. 445. In the divorce complaint and answer they advised the court that such settlement had been made and consequently no award by the court would be requested. The court in its decree found this to be the fact. It took no action toward settlement of property rights nor did it reserve any power in the decree to thereafter modify the settlement. By so doing the court accepted the settlement as agreed upon by the parties. Under such condition the contract of the parties and the decree effects a final and complete settlement of such property rights and was not subject thereafter to change by the court. *Helvering* v. *Fitch*, 309 U. S. 149; *Helvering* v. *Leonard*, 310 U. S. 80; *Helvering* v. *Fuller*, 310 U. S. 69; *Arthur Letts Jr.*, 41 B. T. A. 1152.

We do not agree with the broad position taken by respondent that a transfer under such circumstances and without donative intent may be subject to gift tax. As the Second Circuit said in *Commissioner* v. *Hyde*,

82 Fed. (2d) 174, in answer to an argument that a trust established for the benefit of a wife under somewhat similar circumstances was a gift 'to hold that the trust was established as a voluntary gift * * * would be to close one's eyes to realities.' "

Lasker v. *Commissioner* (C. A. 7, 1943), 138 F. 2d 989, 991, involved a postnuptial settlement in which the husband paid for a release by the wife of marital rights in his property. The agreement expressly provided that it did not release the husband from his obligation to support the wife. The court held:

"After all is said and done the fact remains, and a well near controlling fact it is, that petitioner, with property worth more than $10,000,000, succeeded in acquiring a complete release from all marital liability by the payment of an amount which equalled 3 3/4% of his property worth. We think there can be no doubt but that petitioner's escape and release from his unfortunate matrimonial adventure constituted adequate and full consideration for the payment thus made.

* * * * *

Furthermore, we are of the view that respondent's contention must be denied because of the provision contained in Treasury Regulation 79, Art. 8, as follows: 'However, a sale, exchange or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length and free from any donative intent) will be considered as made for an adequate and full consideration in money or money's worth.' It is not disputed by respondent, in fact we understand it to be conceded that the transaction in controversy comes clearly within the language

of this provision. Each of the parties was represented by counsel, each was advised as to his and her rights, and especially was petitioner's wife informed as to the total value of petitioner's property. With such knowledge, they bargained and produced a result evidently satisfactory to both. The presence of counsel at the conference table for the purpose of advising and representing the respective parties as to their rights and other relevant facts and circumstances dispels any rational theory that a payment made in connection with such settlement was intended for or could have been a gift."

In *Fahs* v. *Merrill* (C. A. 5, 1944), 142 F. 2d 651, 654, the court, in holding a relinquishment of marital rights in an antenuptial settlement not to be a consideration to any extent for gift tax purposes, distinguished it from a postnuptial settlement as follows:

"It will be noted that the agreement of March 7, 1939, which is the recited and actual consideration for the transfer, and which alone purports to relinquish anything on the part of Miss Desmare, was made before she was married, when she had no dower or other right whatever in Merrill's property. It is not a case in which one already a wife sells or relinquishes for a consideration the rights which the law has given her, whether she relinquishes them to her husband or to another. We may well concede that in such a case she gives a money value for what she gets. Such is Lasker v. Commissioner, 7 Cir., 138 F. (2d) 989. This case is one in which a woman offers herself in marriage and herself alone * * *. Merrill receives that and nothing else. It is what moves him to make

a provision for her. When the transaction is consummated he has a wife and $300,000 less money."

The *Merrill* case was affirmed by this Court (324 U. S. 308) which decided it with *Commissioner* v. *Wemyss*, 324 U. S. 303.

In the *Wemyss* case, a widow was receiving an income from a trust created by her deceased husband which was to cease if she remarried. The taxpayer wished to marry her. Because of her unwillingness to sustain this loss of income, the taxpayer entered into an agreement with her by which he transferred certain property to her and shortly thereafter they were married. The Tax Court (2 T. C. 876) held that the promise of marriage was not to any extent a consideration in money or money's worth for the transfer. The Court of Appeals for the Sixth Circuit reversed (144 F. 2d 78). This Court (Mr. Justice Roberts, dissenting) reversed and affirmed the Tax Court. The *Wemyss* case did not involve a true antenuptial settlement, since the taxpayer received no relinquishment of any marital rights in his property or estate but merely a promise of marriage. This was held not to be a promise reducible to money or money's worth.

The *Merrill* case involved a true antenuptial agreement whereby a woman relinquished all rights which she might acquire as wife or widow in her prospective husband's property in consideration of his agreement to transfer certain property to her. The District Court (51 F. Supp. 120) held such transfer to be for an adequate and full consideration in money or money's worth. The Court of Appeals (142 F. 2d 651) reversed. This Court (Chief Justice Stone and Justices Roberts, Reed and Douglas, dissenting) affirmed the Court of Appeals. The basis of this Court's holding is

that the provision in the estate tax statute (Section 303 d as amended by Section 804 of the Revenue Act of 1932, now Section 812 b Internal Revenue Code, Appendix, *infra* p. 79), that a relinquishment of dower, curtesy or of other marital rights shall not be considered to any extent a consideration in money or money's worth, is in *pari materia* with the gift tax statute.

This Court in the *Merrill* and *Wemyss* cases made no reference to postnuptial settlements nor did it refer to the *Lasker* or *Jones* cases or to the distinction made in those cases, and by the Court of Appeals in the *Merrill* case, that in an antenuptial settlement the release is of potential marital rights while in a postnuptial settlement the parties are dealing with vested and existing rights which one spouse cannot cut off without the other's consent and which have a definite and existing value, which must be bargained for at arm's length when the spouses have reached a parting of the ways (*Frank* v. *Commissioner* (C. A. 3), 51 F. 2d 923; *Yost* v. *O'Malley* (D. C. Neb., 1950), 88 F. Supp. 626). In an antenuptial settlement the relinquishment of marital rights is actually given for the promise of marriage, and if no such release is given, the other party can refuse to consummate the marriage and such rights would never come into existence at all. The giving of any money or property for such relinquishment is thus incidental to the promise of marriage and in that sense it may be said to be gratuitous. The Solicitor General in his brief (p. 27) in this Court in the *Merrill* case made such a distinction between antenuptial and postnuptial settlements, citing the *Jones* and *Lasker* cases.

The first case to come before the Tax Court after the decisions of this Court in the *Merrill* and *Wemyss* cases, *supra*, was *Converse* v. *Commissioner* (*en banc*, 1945), 5

T. C. 1014, 1015, 1016, affd. on another ground (C. A. 2) 163 F. 2d 131, 133. The Tax Court said (p. 1016):

> "This Court in the *Wemyss* case, pointed out the difference between that case and the *Jones* case. The two Supreme Court cases just mentioned as well as the *Bristol* case, all dealt with antenuptial agreements. The Supreme Court did not deal with the question which was in the *Jones* case and did not indicate its views on that question. We follow the *Jones* case."

There then followed a series of decisions in which the Tax Court adhered to this position:

Lahti v. *Commissioner* (*en banc*, 1946), 6 T. C. 7, 8, 9;

Mitchell v. *Commissioner* (1946), 6 T. C. 159, 164, 165;

Barnard v. *Commissioner* (1947), 9 T. C. 61, 66, 67 revd. 176 F. 2d 233;

Moore v. *Commissioner* (*en banc*, 1948), 10 T. C. 393, 397;

The instant case (*en banc*, 1948);

Beveridge v. *Commissioner* (*en banc*, 1948), 10 T. C. 915, 918;

McLean v. *Commissioner* (*en banc*, 1948), 11 T. C. 543, 547, 548;

Taurog v. *Commissioner* (*en banc*, 1948), 11 T. C. 1016, 1020, 1021;

Harding v. *Commissioner* (*en banc*, 1948), 11 T. C. 1051, 1056;

Hill v. *Commissioner*, C. C. H. Dec. 14, 974 (M) (1946);

Ledyard v. *Commissioner*, C. C. H. Dec. 15, 087 (M) (1946);

Forstman v. *Commissioner*, C. C. H. Dec. 15, 619 (M) (1947);
Judson v. *Commissioner*, C. C. H. Dec. 15, 662 (M) (1947);
Gould v. *Commissioner*, C. C. H. Dec. 15, 894 (M) (1947).

In *Estate of Josephine S. Barnard* v. *Commissioner*, *supra*, 9 T. C. 61 (1947), the transfers were made by the wife to the husband in a separation agreement. The consideration for the transfers was conceded by the taxpayer to be the relinquishment of marital rights by the husband. The Tax Court held (p. 66):

"At the time of the execution of the separation agreement, Mrs. Barnard was worth, in her own right, more than $600,000, consisting in part of real estate located at Osterville, Massachusetts, and worth at least $35,000, and, in addition, was a life beneficiary under a trust created for her benefit by her grandfather, from which trust for a number of years, including 1943, she received an average annual income of at least $25,000.

The question here presented is whether the transfers made on August 12, 1943 and on or about October 25, 1943, of $50,000 each are subject to the Federal gift tax. * * *

We will consider first the transfer made on August 12, 1943, in pursuance of paragraph Third of the separation agreement. The facts as to this transfer present a situation which we think are not distinguishable in principle from the facts in the cases of *Lasker* v. *Commissioner*, 138 Fed. (2d) 989; *Herbert Jones*, 1 T. C. 1207, petition for review to C. C. A. 7 dismissed May 1, 1944; *Edmund C. Converse*, 5 T. C. 1014, on

appeal to C. C. A. 2; *Matthew Lahti*, 6 T. C. 7; and *Clarence B. Mitchell*, 6 T. C. 159, petition for review to C. C. A. 7, dismissed October 7, 1946. In most business transactions made at arm's-length, each party is seeking to profit and the profits so realized are not gifts. As the court said in *Commissioner* v. *Mesta*, 123 Fed. (2d) 986: 'We think that we may make the practical assumption that a man who spends money and gives property of a fixed value for an unliquidated claim is getting his money's worth.' Here Mrs. Barnard was seeking to free her property from all claims of her husband and gave in payment therefor what she considered to be the reasonable value thereof. Since these claims were unliquidated, it may be assumed, as the court said in the *Mesta* case, that she received her money's worth and accordingly did not make a taxable gift of this $50,000 to Barnard. We hold upon the authority of the above cited cases that the transfer made on August 12, 1943, was made without donative intent in an arm's-length transaction for an adequate and full consideration in money or money's worth and that the respondent erred in subjecting it to the Federal gift tax."

In this case, also involving transfers from the wife to the husband, the consideration was not the relinquishment of marital rights, but a release of claims in a division of specific property which was a litigated issue in the divorce suit, as will be seen from our discussion *infra*. However, in view of its broad all-inclusive holding in the *Barnard* case, following its other holdings, that in a postnuptial settlement at arm's length, a relinquishment of marital rights is an adequate and full consideration in money or money's worth, the Tax Court, in this case, found it un-

necessary to consider the other questions present and merely decided *en banc*, in favor of the petitioner on authority of the *Barnard* case (10 T. C. 741, 746; R. 9). The Court of Appeals for the Second Circuit reversed the Tax Court in the *Barnard* case (176 F. 2d 233 (1949) on the ground that the decision of this Court in *Merrill* v. *Fahs, supra*, so required, thereby disagreeing with the position steadfastly held by the Tax Court and with the Court of Appeals for the Seventh Circuit in *Lasker* v. *Commissioner, supra.*

The Tax Court has viewed divorce settlements between estranged spouses, made through counsel at arm's length, in which each is seeking to obtain the best possible financial advantage, with an eye for what they actually are. Such transactions contain no element of a gift and to so hold "'would be to close one's eyes to realities'" (*Jones* v. *Commissioner, supra*).

The Tax Court has accordingly held that in providing in Section 812 b (Appendix *infra* p. 79) that a relinquishment of dower, curtesy or other marital rights shall not be considered to any extent a consideration in money or money's worth, Congress intended to forestall only such transfers either prior to or during marriage when no divorce is contemplated, and when the parties might not be dealing at arm's length but consummating an amicable family arrangement to avoid taxes. (*Jones* v. *Commissioner, supra*, 1 T. C. 1210; *Fleming* v. *Yoke*, 83 F. Supp. 552, 555; affd. 145 F. 2d 472.)

The Commissioner has himself been compelled to recognize the force of the Tax Court's interpretation of the Congressional intent in the enactment of the statute. Thus, after having urged in a number of cases that transfers in satisfaction of support rights were taxable as gifts, the Commissioner has conceded the correctness of the Tax

Court's position. Although judicial holdings were to the effect that support rights are marital rights, the Commissioner nevertheless issued E. T. 19, 1946—2 C. B. 166 (Appendix *infra* p. 81), in which ruling he stated that such decisions, therein cited, would not be followed, since Congress, as the Tax Court had held all along, did not intend such rights to be included in the marital rights contemplated by Section 812 b. The Commissioner ruled, however, that transfers in satisfaction of property or inheritance rights were within the statute.

To the extent that the ruling (E. T. 19) did not also exclude transfers in satisfaction of such other presently enforceable claims the Tax Court in *McLean* v. *Commissioner*, 11 T. C. 543, 547, 549, *en banc*, 1948, held the ruling invalid. The Tax Court said:

> "In respect of all payments due the wife, we are convinced that there was no donative intent, but that, on the contrary, the provisions for her benefit were the result of bargaining between the parties two attorneys which had as the sole object the securing of terms most advantageous economically for their respective clients.
> • • •
>
> Respondent challenges this view invoking E. T. 19, 1946—2 C. B. 166, in which he ruled that transfers of property pursuant to an agreement incident to divorce are not for adequate and full consideration in money or money's worth and hence taxable gifts under Section 1002, Internal Revenue Code to the extent that they are made in consideration of the release of marital rights except the right of maintenance or support. This ruling is based on *Commissioner* v. *Wemyss*, 324 U. S. 303 and *Merrill* v. *Fahs*, 324 U. S. 308, both of which involved transfers made pursuant to antenuptial

agreements. In the former the taxpayer made the transfer solely as an inducement to marriage, compensating the prospective bride for trust income which she lost by remarriage. In the latter the taxpayer made the transfer in consideration of marriage and the prospective bride's release of all rights that she might acquire as wife and widow in his property except the right of support.

We cannot construe those holdings as covering a situation in which divorce has converted the wife's marital rights into immediately enforceable claims. By making the agreement under the circumstances here shown, petitioner was not gratuitously diminishing his taxable estate, but, on the contrary, was defending it by making the most advantageous settlement possible of his wife's claims against him. Conceivably he could have transferred to her more than the minimum demanded or than the court ordered. Such an excess has been held a gift. Estate of *Josephine S. Barnard, supra* (second issue). But the evidence rebuts any inference that petitioner did not seek his best advantage in the negotiations leading to the agreement here considered. For reasons not clear to us, E. T. 19 excepts support and maintenance from marital rights the release of which does not constitute full and adequate consideration. We deem the ruling invalid in so far as it does not also except transfers made to settle presently enforceable claims."

B.

In the *Barnard* case, it was conceded by the taxpayer in the Court of Appeals (Brief p. 6) that all that was received was the relinquishment of marital rights. This case closely followed the *Barnard* case in the Court of Appeals. Evi-

dently having its ruling in the *Barnard* case in mind, the Court of Appeals mistakenly stated in this case (R. 29):

> "The taxpayer having paid this excess in exchange for her husband's relinquishment of all his marital rights in her property on her death, if the agreement had stood alone, there can be no doubt that under Merrill v. Fahs, supra, a gift tax would have been due."

In this case the agreement did contain a provision by which the parties did relinquish any right to share in the estate of the other upon the other's death (R. 16). This is a customary provision formally included in such agreements. But, as petitioner, herself, pointed out in the Court of Appeals, the agreement was to be effective only if a divorce decree was entered in the pending action (R. 18). Therefore, petitioner stated in the Court of Appeals that she placed no reliance on such relinquishment as a consideration. For, in case of a divorce, neither, upon the death of the other, would be a surviving spouse and therefore would have no such rights to relinquish. This is probably the rule in all jurisdictions. The parties here were originally British subjects, who subsequent to the divorce both became residents of New York, the husband still remaining a British subject. The husband, Reginald Wright, subsequently died in New York, a British subject. Under Section 87 of the Decedent Estate Law (McKinney's Consolidated Laws of New York Ch. 13),[3] a divorced spouse is excluded from any distributive share in the estate of the

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[3] "No distributive share of the estate of a decedent shall be allowed under the provisions of this article, either

(a) to a spouse against whom or in whose favor a final decree or judgment recognized as valid by the law of this state has been rendered."

other, and is not entitled to letters of administration in the estate of the other (*Matter of Ensign*, 103 N. Y. 284; *Matter of Albrecht*, 118 Misc. 737, 194 N. Y. S. 432; 119 Misc. 554, 196 N. Y. S. 765). The British law is to the same effect. (Administrative Estate Act of 1925 (15 Geo. 5c. 23); Halisbury's Laws of England (2d Ed.) Vol. X, sec. 837.)[4]

Therefore, by paragraph 10 of the agreement, neither party received anything from the other, and there was no relinquishment of any marital rights of inheritance.

Petitioner's claim of consideration, which was not mentioned or referred to by the Court of Appeals, is as follows:

An action for divorce was instituted by the petitioner against her husband in the Second District Court of Nevada. The husband appeared in said action and contested it (R. 11, 20). One of the litigated issues was the disposition of the separate property of the parties. The applicable statute as it read on March 6, 1943, when the case was tried, is Section 9463 of the Nevada Compiled Laws of 1929, as amended (Appendix, *infra* p. 83) which provided as follows:

> "In *granting a divorce*, the court *may* award such alimony to the wife and *shall* make such disposition of the community and separate property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired,

[4] "Where the marriage has been dissolved by a decree of absolute divorce, on the death intestate of one party to the marriage, the other is not a surviving husband or wife and therefore takes no interest in the estate."

and to the burdens, if any, imposed upon it for the benefit of the children. * * *" (Italics supplied.)

In *Lewis* v. *Lewis*, 53 Nev. 398, 410; 2 P. 2d 131, 135, the court said:

"It will be seen from an examination of our statutes 9463, 9465, Nev. Comp. Laws 1929, that the trial court has a right conferred upon it to make such property settlement as may seem just and equitable."

Under this statute the Supreme Court of Nevada held in the case of *Buaas* v. *Buaas*, 62 Nev. 232, 235; 147 P. 2d 495, 496:

"Under Section 9463, N. C. L. 1929, the trial court has authority to inquire into the existence of property of either spouse and to make an investigation thereof with the view of making such adjustment as 'will attain right and justice between the parties under all the circumstances which may attend the particular case' *Walker* v. *Walker*, 41 Nev. 4 at page 10, 164 P. 653, 169 P. 459."

The exercise of such authority conferred by the statute on the trial court, was an act of discretion, which could be disturbed on appeal, like all rulings in discretion, only for a patent abuse in the exercise thereof. As the Supreme Court of Nevada said in *Cunningham* v. *Cunningham*, 61 Nev. 93, 95; 116 P. 2d 188:

"But it is asserted that the comparative value of the property awards and alimony is so out of proportion in favor of the husband as to show absolute unfairness on the part of the trial court.

"We are not inclined to this view. As a review of the evidence would serve no useful purpose, we will not undertake it. It is enough to say that the evidence reveals that the division and alimony were well within the latitude of discretion conferred upon the trial court by the statute. Section 9463 N. C. L. as amended by Stats. 1939 p. 18."

It is thus evident that the Nevada court had, under this statute, jurisdiction of all of the property of the parties with power to make such disposition of such property between them as it deemed just and equitable. This was a considerable power indeed. It may have been a realization of this, occasioned possibly by criticized distributions by the courts thereunder, which caused the Nevada Legislature by ch. 91 p. 117 of the Laws of 1943, effective March 13, 1943, to amend the statute by striking therefrom the words "and separate."[5]

However, on March 6, 1943, the former statute was in effect and was applicable to the divorce action between the petitioner and her husband. There was no community property; the parties having never resided as husband and wife in Nevada and the husband having never been a resident of Nevada.

As the Tax Court found upon the evidence (Typewr. Tr. pp. 114-117, 129), the petitioner was worth "in excess of one million dollars at that time" (R. 5). The divorce suit was contested by the husband. One of the things he sought in such contest was as much of the petitioner's separate

[5] The amendment also inserted the following sentence in the statute: "The court may also set apart such portion of the husband's property for the wife's support and the support of their children as shall be deemed just and equitable."

property as he could get. In addition, the parties during their marriage had engaged in many transactions between themselves concerning various items of property, and each made claim to these properties which was disputed by the other. These property claims would likewise be required to be adjudicated in the lawsuit.

The petitioner was thus in the position in the Nevada court of having all her separate property, and the property title to which was in dispute, subject to division by the trial court between her and her husband. As is frequently the case in lawsuits, each of the parties deemed it expedient to settle the matter in litigation, in the hope of thus achieving a reasonably favorable result rather than risk what the court might do. In this case the property disposition would, in any case, be required to be made by the court regardless of what the parties agreed with respect thereto. But the parties hoped that by settling it between them, they might favorably influence the court to determine that their property settlement was just and equitable and one which the court itself would make.

Therefore, the parties entered into the agreement (R. 10) in which they said:

> "A suit for divorce has been filed by the Wife against the husband, which suit is being contested by the Husband and is now pending in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, of which Reno is the county seat. This agreement is made for the purpose of settling the respective property rights of the parties hereto and of removing the subject matter thereof from the field of litigation." (Recital b, R. 11.)

The parties then proceeded to provide for a division between them of certain properties, claim to which had been made by both and was disputed. (Recitals c, d, f, pars. 2, 9; R. 11, 12, 13, 16.)

In addition, in settlement of the respective claims of each to the separate property of the other, the wife made certain transfers to the husband and the husband made certain transfers to the wife. The husband received from the wife the following: her promise to pay him $416.66 a month for ten years (par. 3, R. 13); an assumption by her of the indebtedness of $47,650 to the National City Bank (par. 7, R. 15); and the creation of a trust for the lifetime of the husband of her remainder interest in a trust then in existence known as the DeLangley trust (par. 8, R. 15). The wife received from the husband the following: the remainder in fee after the death of the husband of 21/90 of property known as 448 Fifth Avenue, New York City (par. 5, R. 14); $2,131.10 in cash resulting from the sale of certain securities (par. 6, R. 14); a discontinuance of a partition suit pending with respect to the property known as 448 Fifth Avenue (par. 5, R. 14); an assumption by the husband of all liability on a bond and mortgage on property known as 21 Culross Street, London, England, and an indemnity agreement saving the wife harmless from any liability on said bond and mortgage and an indemnity agreement saving the wife harmless from any liability of any kind in connection with the property located at Biarritz, France (par. 11, R. 17); certain personal property in the possession of the husband and the assumption by the husband of the payment of the unpaid bills in connection with such personal property (par. 9, R. 16). The parties released each other from any claims to any of the separate property of the other not referred to or transferred in the agreement (par. 11, R. 16-17).

Thus, the petitioner in obtaining a divorce decree, unavoidably, by law, subjected her separate property, which was substantial, to division with her husband. She could litigate the issue and take her chances on the court's decision or try to influence that decision by presenting an accord to the court by both parties in the hope and expectation that the court would approve it, and thereby get off with a reasonably satisfactory distribution which would save her as much as she possibly could salvage by negotiation. Since the accord was made as an incident of the divorce action and under compulsion thereof, she provided that "it is of the essence of this agreement that the settlement herein provided shall not become operative in any manner nor shall any of the Recitals or covenants herein contained become binding upon either party unless a decree of absolute divorce shall be entered in the pending Nevada action" (R. 18). For, the petitioner was not animated by any gratuitous impulse in making the property settlement, but was making the best bargain she could, and only because she was compelled and obligated by law to do so, and if not so obligated by a divorce decree she had no desire to make any such settlement.

The transaction that took place, as plainly mirrored in the painstakingly worked-out agreement of the parties, was an arm's length transaction and the consummation of considerable haggling and tugging through counsel over every item in detail by which each party extracted from the other the items of property set forth therein.

What petitioner parted with must be measured against what she saved from the reach of her husband under the statute, which was the bulk of her separate property, with respect to which she received a release from all claims of her husband (R. 16, 17).

The petitioner was thus bargaining for the satisfaction of an obligation imposed on her by law, and the trial court found, under the applicable statute, that the payments made by her therefor "are in discharge of a legal obligation which, because of the marital relationship has been imposed upon the plaintiff" (R. 21).

To the extent that any part of the consideration received by the petitioner was unliquidated, it was liquidated by the settlement arrived at by the reluctant payment of as little as could be parted with to obtain it. As was stated in *Commissioner* v. *Mesta* (C. A. 3), 123 F. 2d 986, 988, cert. den., 316 U. S. 695:

> "In the case at bar the amount of the taxpayer's obligation to his wife was fixed in part in terms of stock by the parties themselves who really dealt at arm's length with one another. It was so found by the Commissioner and the taxpayer has not rebutted the presumption that the Commissioner's ruling is correct. We think that we may make the practical assumption that a man who spends money or gives property of a fixed value for an unliquidated claim is getting his money's worth."

But since the court in its decree found the transfers to be the measure of the petitioner's legal obligation (R. 21) and therefore ordered them made (R. 23) the liability was liquidated by the decree and the discharge thereof was for an adequate and full consideration in money or money's worth.

Under the circumstances here, by every test of consideration, it would be unrealistic and contrary to the facts, to assert that the taxpayer did not receive an adequate and

full consideration in money's worth for what she grudgingly gave up, and the requirement of the gift tax statute in that respect has been fully met and complied with in this case. The discharge of the obligation imposed upon her by the Nevada statute was a full and adequate consideration for what she parted with to get it.

The transfers thus made by petitioner in discharge of a legal obligation are thus in the same category as transfers made by a husband in discharge of his legal obligation of support, which the Commissioner himself concedes (E. T. 19) to be for an adequate consideration in money or money's worth. What the Commissioner, in such ruling, concedes with respect to such satisfaction of the legal obligation of support is equally applicable to the transfers herein by petitioner in satisfaction of her legal obligation under the statute (1946—2 C. B. 168):

> "The fulfillment, therefore, of this obligation by the husband merely amounts to the liquidation of a presently existing obligation, the satisfaction of which does not have the effect of diminishing or depleting the husband's estate to any greater extent than the payment of other existing legal obligations."

The respondent in his brief below referred to paragraph 13 of the agreement, in which it was provided that the wife shall be responsible for any gift taxes which may be due by reason of any of the transfers under the agreement (R. 17), as indicating that the parties had in view the incidence of gift tax liability on such transfers. This provision was obviously inserted by the husband merely as a sensible precaution. In 1943, when it was made, the question of gift tax liability was certainly unsettled, and it cannot be said to be settled even today. The Commis-

sioner maintained then, as he still does, that such transfers were taxable. If carried to its logical conclusion, the argument which the Commissioner seeks to base thereon would deny all refunds of taxes erroneously paid. For, the Commissioner would then urge that by filing a return and paying a tax, the taxpayer irrevocably conceded liability, even though the liability was later ascertained not to exist. The construction of tax statutes is still for the courts.

II

The transaction herein was a business transaction at arm's length and free from donative intent and must therefore be deemed to be for an adequate and full consideration in money or money's worth.

A.

Consonant with its appraisal of the realities of an arm's length divorce settlement, the Tax Court views it as a calculated deal for financial gain on both sides and therefore a business transaction. (Treasury Regulation 108, Section 86.8, Appendix, *infra*, p. 80.) Thus the Tax Court held in *Jones* v. *Commissioner, supra* (1. T. C. 1207, 1212):

> " * * * We think the present transfer was not within the provision of section 503 *supra*. That section can scarcely mean that all arm's length business transactions, involving transfers of property, shall be subjected to scrutiny and, in every case where one party makes a bad bargain, he should have his misfortune increased by the imposition of a tax on his unfavorable balance from the transaction. The tax is imposed by authority of section 501. It is expressly limited to transfers 'by gift'. 'Gift' is not defined in the

statute. The respondent, however, has himself defined the term as used in the controlling statute as excluding arm's length business transactions such as is evidenced here, in which there was no donative intent. Regulation 79, arts. 1, 2 and 8, approved October 30, 1933, and arts. 1, 2 and 8 of the same regulation, approved February 26, 1936. See *L. W. Mesta*, 42 B. T. A. 933, reversed, 123 Fed. (2d) 986; certiorari denied, 316 U. S. 695; *Walter S. Hallwell, supra.* We think this is correct."

The Court of Appeals for the Seventh Circuit in *Lasker* v. *Commissioner, supra* (138 F. 2d 989, 991), similarly so held.

Thus, in this case, the parties dealt at arm's length, through counsel, in what was plainly a drawn out negotiation over many specific items of property. For example, both parties had contributed to the purchase price of certain business real property located at 448 Fifth Avenue, New York City (R. 12), which purchase was clearly a business transaction. In settling their disputed claims to this property and in disposing of them, they were likewise engaging in a business transaction. So with respect to the negotiations concerning the discharge of the note of $47,650 held by the bank (R. 15) and the disposition of the securities held by the bank as collateral (R. 14), and the discontinuance of the partition suit (R. 14) and the assumption of liability with respect to the bond and mortgage on property in London (R. 17), and the assumption of liability with respect to the property in France (R. 17). These were indisputably business transactions.

Whether or not a transaction is a business transaction is ordinarily a question of fact.

In *Estate of Barnard* v. *Commissioner, supra,* 9 T. C. 61, 67, the Tax Court found the transaction to be a "business transaction made at arm's length" in which "each party is seeking to profit and the profits so realized are not gifts." In this case the Tax Court made no such specific finding but since it decided this case by stating that "the *Barnard* case will be followed as authority in this case" (R. 9), such finding is implicit in this case.

In *Commissioner* v. *Wemyss,* 324 U. S. 303, 306, 307, this Court stated:

> "Thus on finding that transfer in the circumstances of a particular case is not made in the ordinary course of business, the transfer becomes subject to the gift tax to the extent that it is not made 'for an adequate and full consideration in money or money's worth'. See 2 Paul, Federal Estate & Gift Taxation (1942) page 1113.
>
> The Tax Court in effect found the transfer of the stock to Mrs. More was not made at arm's length in the ordinary course of business. It noted that the inducement was marriage, took account of the discrepancy between what she got and what she gave up, and also of the benefit that her marriage settlement brought to her son. These were considerations the Tax Court could justifiably heed, and heeding, decide as it did. Its conclusion on the issue before it was no less to be respected than were the issues which we deemed it was entitled to decide as it did in Dobson v. Commissioner of Internal Revenue, 320 U. S. 489, 88 L. ed. 248, 64 S. Ct. 239; Commissioner of Internal Revenue v. Heininger, 320 U. S. 467, 88 L. ed. 171, 64 S. Ct. 249; Commissioner of Internal Revenue v. Scottish American Invest. Co. 323 U. S. 119 ante 113, 65 S. Ct. 169."

The rule in the *Dobson* case as to the review of Tax Court decisions has been altered by amendment to Section 1141 a of the Internal Revenue Code, effective September 1, 1948. The decision of the Tax Court in this case (R. 10) was made prior to that date, so that the applicability of the amended statute to it is questionable. Nevertheless, even if the amended statute applies, the finding of the Tax Court in this case that this was a business transaction is still entitled to great and even controlling weight, just as was the contrary finding of the Tax Court in the *Wemyss* case. Decisions of the Tax Court, even on questions of law, have always been accorded great weight in view of the Tax Court's respected status as expert in this field (*Bingham's Trust* v. *Commissioner*, 325 U. S. 365). The same weight should be accorded the finding of the Tax Court in this case that this was a business transaction, as was accorded the contrary finding of the Tax Court in the *Wemyss* case.

B.

Furthermore, the bona fide settlement at arm's length of a genuine litigation is a financial deal in which each party is acting for profit and has all the elements of and is a business transaction.

Basic in every compromise of a contested litigation is the yielding by each of the parties of something of what he claims to be justly entitled to and has a prospect of obtaining if the litigation proceeds to trial. Such concessions are generally wrung from reluctant and grudging negotiators in the hard process of bargaining. But, without them, no compromise would be achieved. It borders on the fanciful to say that what is so yielded is a gift.

Thus, in settlements of genuinely litigated claims the parties are dealing at arm's length, one seeking to obtain

as much as possible for his alleged damage or injury and the other to yield as little as possible for a release thereof, each bearing in mind the uncertainties and cost of a law suit. Congress, in such cases plainly intended that the adequacy of the consideration in such settlements not be open to inquiry for tax purposes, so as to permit the Commissioner to ascertain that the person who might be said to have paid too much or received too little be deemed to have made a gift of the excess to the other.

The parties to the thousands of settlements of tort claims constantly being consummated would indeed be surprised at the contention that such settlements may have implanted in them the seeds of gift tax liability.

Here, the petitioner and her husband were, as required by statute, engaged in litigating, in the divorce action, the question of a division of their separate property. Each, being aware of the caprices of litigation, decided to submit an accord on this issue to the court in the hope that the court would approve and adopt it as its own finding on the trial, and thereby adjudicate their respective liabilities accordingly.

In such settlements under the compulsion of litigation, each party is seeking to make the best bargain possible, bearing in mind the imponderables in the fixing of the value of a disputed and litigated liability. Since the considerations which thus enter into such a settlement are in large part unliquidated, the considerations received and paid respectively are rarely susceptible of precise measurement. Even if they were, in few cases would the considerations precisely balance. Thus, in virtually every case, one party would be deemed to have been worsted in the trading mart and under the Commissioner's contention, clearly negatived by the contrary intent of Congress, would have

the additional penalty visited upon him of having to pay a gift tax on his bad bargain. "Compromises of disputed claims are favored by the courts." (*Williams* v. *First National Bank*, 216 U. S. 582, 595.) But if the gift tax hovered over the settlement of lawsuits, litigants would shy away from settlements and let the litigation proceed to trial. Then, whatever the court adjudged that the parties pay or receive would not, at least, involve a gift tax liability. This would certainly have the effect of defeating the public policy of encouraging settlements of litigation. Plainly, however, such transactions are not pregnant with gift tax consequences, and Congress never intended the gift tax to apply to them.

In *Mitchell* v. *Commissioner*, 6 T. C. 159, 165 (1946), pet. for rev. dismissed (C. A. 7) October 7, 1946, the Tax Court said:

> "Petitioner argues correctly, we think, that it would be an error to hold that payments made as directed by a court of competent jurisdiction for the support of the wife and without agreement constituted taxable gifts, and, since this is so, transfers agreed upon to avoid litigation but expressly approved and directed to be made by judicial order should not be considered taxable gifts."

In *Beveridge* v. *Commissioner*, 10 T. C. 915, 918, *en banc*, 1948, the taxpayer's daughter had transferred property to her without consideration prior to the daughter's marriage to a man to whom the taxpayer objected. The daughter thereafter made demand for the property, alleging that she had transferred it to the taxpayer under duress and threatening suit to recover it. After negotiations, through the attorneys for the respective parties, the taxpayer agreed to transfer $120,000 in trust for the

daughter's benefit and did so, obtaining from the daughter a release of all claims. The Tax Court held the transfer of $120,000 in trust not to be a gift but for an adequate and full consideration in money or money's worth. The court said:

> "Perhaps she could have successfully resisted the daughter's threatened suit, but her attorneys were not certain of the outcome of the litigation and so advised her; the value of the property defended was substantial and by accepting that settlement, she avoided additional legal expenses. She acted in our opinion, as one would act in the settlement of differences with a stranger.
>
> The transfer made is analogous for tax purposes to those of spouses who agree upon a property settlement prior to divorce in order to satisfy existing claims of one against the other. Transfers pursuant to such agreements are not gifts and are not subject to gift tax." (Citing cases.)

III

The transfers made by the petitioner to her husband in 1943 were in payment and discharge of a legal obligation imposed by the judgment of the Nevada court entered March 6, 1943, and were therefore not subject to gift tax.

A.

The divorce suit which had been commenced by the petitioner was contested by her husband. The trial of this contested litigation was set for March 6, 1943. One of the litigated issues was that of a disposition of the separate property of the parties under Section 9463 of the Nevada

Compiled Laws, *supra* (Appendix *infra*, p. 83). This statute provided that "*in granting a divorce* the court *may* award such alimony to the wife and *shall* make such disposition of the community and separate property of the parties as shall appear just and equitable." (Emphasis supplied.)

Thus, the use of the mandatory "shall" in connection with the property disposition, as contrasted with the permissive "may" in connection with an award of alimony, indicates quite clearly that the court was required to make such disposition and that such duty was imposed on it "in granting a divorce", which makes it plain that such property disposition was required to be made in the judgment and decree of divorce and was thus a necessary and essential part of such decree.

On February 27, 1943, one week prior to the trial, the parties entered into an agreement to be effective and operative solely in the event the court on the trial granted a divorce (R. 18) and thereby was required to make the property disposition under the aforesaid Nevada statute. By the agreement, the litigants, instead of presenting conflicting evidence on the trial of this issue, came to an accord thereon in the hope and expectation that the court would find such property settlement, upon investigation on the trial, to be fair and equitable and would adopt it as its own. By such agreement the parties did not take the issue away from the court, but they did resolve the conflicting evidence and claims concerning it which they would have presented on the trial and removed such prospective controverted evidence from the litigation. That was all they could do. They could not take this issue from the court, even if they wished to. For in Nevada, as we have seen, the question of a property disposition is for the court whose

duty it is to make its own investigation and thereon to make such disposition, which duty cannot be abdicated in favor of the will of the parties. (*Buaas* v. *Buaas, supra,* 62 Nev. 232, 235; *Lewis* v. *Lewis, supra,* 53 Nev. 398, 411; *Yoke* v. *Fleming,* 145 F. 2d 472, affg. 53 F. Supp. 552.) Such accords on such controverted issues on the trial are, however, universally sought and encouraged by the courts, not in the sense of yielding the court's prerogative and duty of deciding the issue, which the court, in a matrimonial litigation cannot avoid, but as a distinct aid to the court in determining what is a fair, just and equitable division of property, which may not always be satisfactorily ascertained with precision on conflicting testimony. If the court, upon investigation, finds such accord to be fair and equitable to both parties, it is generally inclined to adopt and approve it as its own adjudication of the issue.

Thus, in *Lewis* v. *Lewis, supra,* 53 Nev. 398, 411; 2 P. 2d 131, 136, the court held:

> "It is our opinion that the trial court in no instance is bound by the written agreement of the parties to a divorce action. It may or it may not adopt, according to its judgment, wisdom and discretion, such written agreement if it deems the same to satisfactorily care for the interests of the respective parties to the action and the minor children, if any. It is not bound to do so, however, and may, in its discretion, cast aside and refuse to adopt any such agreement, which the parties might have, with the utmost good faith entered into. The mere fact that the trial court does occasionally, and perhaps in most instances, adopt as a part of its findings and decree an

agreement which the respective parties might have entered into settling and adjusting their property rights and differences and even payments of alimony, does not, of itself, signify that it cannot, if it desires, adopt its own."

The trial of the divorce suit was thereafter had on March 6, 1943. Both sides appeared by counsel, and evidence was introduced upon the issues raised by the complaint of the plaintiff and the answer of the defendant (R. 20). The court on such evidence found that the petitioner had established her grounds for a divorce and thus that she was entitled to have such divorce granted (R. 21). The court, thereupon, then turned to the issue of the property disposition which under the statute the court was required to make "in granting a divorce" (Sec. 9463). The court considered the evidence on this issue, which included the agreement of the parties, which the court weighed and investigated with the other evidence in an inquiry as to whether it was fair and equitable. The court on this issue likewise made its findings on the evidence (R. 20) and entered its judgment thereon (R. 22). The pertinent provisions of the Findings of Fact and Conclusions of Law (R. 21) and the Judgment and Decree of Divorce (R. 23) are as follows:

"FINDINGS OF FACT:

* * * * *

IV.

That under date of February 27th, 1943, the plaintiff and defendant entered into an agreement and trust agreements forming a part thereof, under the terms of which the parties settled all obligations arising out of their marriage. The Court finds that the

payments to be made by the plaintiff to the defendant, as set forth in paragraphs 3 and 8 of said agreement and the trust agreements forming a part thereof, are in discharge of a legal obligation which, because of the marital relationship has been imposed upon the plaintiff.

* * * * *

CONCLUSIONS OF LAW

* * * * *

II.

That the agreement and trust agreements forming a part thereof, made and entered into between plaintiff and defendant under date of February 27th, 1943, is entitled to be approved."

"JUDGMENT AND DECREE OF DIVORCE

* * * * *

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the agreement and the trust agreements forming a part thereof between the parties under date of February 27th, 1943, a copy of which agreement and the trust agreements forming a part thereof was introduced in evidence in this cause and marked Plaintiff's Exhibit 'A', is hereby approved. Notwithstanding the approval of said agreement and the trust agreements forming a part thereof by the Court herein, IT IS ORDERED that said agreement and said trust agreements forming a part thereof shall survive this decree.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff pay to the defendant the payments provided for in paragraphs 3 and 8 of said agreement and the trust agreements forming a part thereof."

Thus, the court herein did not merely approve the agreement. It made independent and separate findings based on its own independent examination, with respect to the payments to be made by petitioner and decreed that petitioner make them.

The transfers thus decreed were made liquidated debts by such decree which the petitioner was in law obligated to discharge and which would be valid and binding claims against her estate if she died before making them.

Section 812 b(5) of the Internal Revenue Code, Appendix *infra* page 79, dealing with deductions under the estate tax, provides that such deductions "in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, *when founded upon a promise or agreement,* be limited to the extent that they were *contracted bona fide and for an adequate and full consideration in money or money's worth.*" (Italics supplied.)

This language was inserted in Section 303 a of the Revenue Act of 1926 by Section 805 of the Revenue Act of 1932. The statute had previously provided for such deductions "to the extent that such claims, mortgages or indebtedness *were incurred or contracted bona fide and for an adequate and full consideration in money or money's worth.*" (Italics supplied.)

This amendment is declared by H. Rep. No. 708, 72d Cong. 1st Sess. page 48 and S. Rep. No. 665, 72d Cong. 1st Sess. page 51 to be one which "merely clarifies the existing law" and is therein stated to be:

> "A clarifying provision limiting the requirement of an adequate and full consideration in money or money's worth to liabilities founded on contract. The existing law might be open to a construction under which no claim against the estate would be deductible unless

supported by an 'adequate and full consideration in money or money's worth,' but the real intent could hardly have been to deny the deduction of liabilities imposed by law or arising out of torts, and the amendment whereby the requirement of a consideration applies only where the liability is founded on contract is designed to clear up any doubt which may be thought to exist."

Thus, plainly the purpose of the statute was to require that where the liability had no other support than the mere promise of the debtor, that it be allowed only to the extent that it was for an adequate and full consideration in money's worth. But when it had been imposed by legal or judicial sanction, the adjudication of such legal liability was accepted as the full measure of the obligation created thereby.

Thus, when the question arose whether, when separation agreements and agreements incidental to divorce are incorporated and approved in the decree of divorce, the claims thereon are "founded on a promise or agreement", the courts have uniformly held, prior to this case, that where the divorce court had power to disregard the agreement and make its own provision, such obligations were imposed by law and thus were not "founded on the agreement" but on the judgment, and were therefore deemed to be for an adequate and full consideration in money or money's worth.

Young v. *Commissioner*, 39 B. T. A. 230;
Mason's Estate v. *Commissioner*, 43 B. T. A. 813;
Ross v. *Commissioner*, C. C. H. Dec. 10, 988A;
Estate of Keller v. *Commissioner*, C. C. H. Dec. 12, 411H;

Commissioner v. *State Street Trust Co.* (C. A. 1), 128 F. 2d 618;
Yoke v. *Fleming* (C. A. 4), 145 F. 2d 472 affg. 53 F. Supp. 552;
Commissioner v. *Swink* (C. A. 4), 155 F. 2d 723;
Commissioner v. *Maresi* (C. A. 2), 156 F. 2d 929, affg. 6 T. C. 582.

In *Commissioner* v. *State Street Trust Co., supra* (C. A. 1), 128 F. 2d 618, 621, the court said:

> "As was said in *Oakes* v. *Oakes,* 266 Mass. 150; 165 N. E. 17, 18:
>
> 'The so-called agreement between the husband and wife did not in any way deprive the court of its power and jurisdiction to alter its former decree providing for the amount of alimony to be paid. * * * The judge may give due consideration to said contracts when they are free from fraud, collusion or coercion, but his power is not abrogated. He is required to use his sound discretion and best judgment in passing on the question.'
>
> It is true as the Commissioner contends that there is no difference between a divorce decree fixing the wife's marital rights and a separation agreement which provides a settlement in lieu of those rights insofar as the nature of what is given up is concerned. We cannot escape, however, the clear language of the statute."

In *Fleming* v. *Yoke, supra,* 53 F. Supp. 552, 555, 556, affd. (C. A. 4) 145 F. 2d 472, the court held:

> "It is reasonable to believe that in enacting the limitation in question Congress intended to prevent

collusive agreements between spouses whereby a dower or curtesy interest, or similar statutory substitute therefor could be excluded from gross estate thereby defeating Congressional intent to include such interest of a surviving spouse. For this reason it excluded as a deduction all claims based only upon agreements of spouses. Divorce decrees are not collusive but adversary in their nature. Such decrees do not subvert Congressional intent because the dower and curtesy interest of a spouse would not and could not survive the divorce, and therefore would never be included in the gross estate under the statute in question.

After the entry of the divorce decree Doris Underhill Fleming was no longer a member of decedent's family. Thereafter the only relationship existing between them was that of a judgment creditor and a judgment debtor. As such judgment creditor the law gave her the same rights to enforce her claim as it gave to all of her creditors. Young, Executrix v. Commissioner, supra.

* * * * *

Since the Nevada court could have changed the terms of the agreement, it is immaterial whether the decree for alimony is incorporated in the decree by consent of the parties or by a determination of the court. Lewis v. Lewis, supra; Skinner v. Skinner, 205 Mich. 243, 171 N. W. 383.

Defendant cites Markwell's Estate v. Commissioner, 7 Cir., 112 F. (2d) 253, Weiser v. Commissioner, 39 B. T. A. 1144, affirmed on another point 10 Cir., 113 F. 2d 486; and Meyer's Estate v. Commissioner 2 Cir., 110 F. (2d) 267. It is true that in all of these cases

there was an agreement followed by a divorce, but in none of them was the agreement adopted or incorporated in the decree of divorce. In each of these cases the claim for deduction was based solely upon the agreement, and not upon a judgment of divorce. The divorce decree in no way entered into the decision of the court in disallowing the deduction. Consequently the point relied upon by plaintiff here was not raised, and could not have been raised in any of the cases cited. In every case where the agreement was approved and adopted by a subsequent divorce decree and this point was raised and considered by the court, the decision has been that the claim is based upon a court decree, and not upon an agreement, and therefore does not fall within the exception."

When the question came before the Court of Appeals for the Second Circuit in *Commissioner* v. *Maresi*, 156 F. 2d 929, 930, 931, that court, in affirming the Tax Court (6 T. C. 582), followed the uniform holdings above-cited and said per Learned Hand, *J*:

"• • • we must therefore here decide whether because the decree of divorce incorporated by reference the separation agreement, Helen M. Maresi's claim against the estate was 'founded upon a promise or agreement.' That question apparently first arose in 1939, and the Board of Tax Appeals held that since the divorce court was free to disregard any allowances made in the separation agreement, the allowances were authentically its own, even in cases where it expressly accepted as proper the allowances actually agreed upon. *Young* v. *Commissioner*, 39 B. T. A. 230. This ruling the Board repeated in 1941 (*Mason's Estate* v. *Commissioner*, 43 B. T. A. 813); and the tax-

payer asserts that it has also done so in 1940 (*Ross* v. *Commissioner*, Mem. Dec. par. 40,025) and in 1942 (*Keller* v. *Commissioner*, Mem. Dec. par. 42,094). The same result has been reached by the First Circuit (*Commissioner* v. *State Street Trust Co.*, 128 F. 2d 618, 142 A. L. R. 913) and twice by the Fourth (*Yoke v. Fleming*, 145 F. 2d 472; *Commissioner* v. *Swink*, 155 F. 2d 723); and there are no decisions to the contrary. At first blush the distinction may seem a little formal, but on consideration it appears to be sound.

* * * * *

But it is pretty clear that that is not the sense in which section 812 b uses the word; rather it means the legal transaction which creates the obligation is the agreement, and in that sense the allowances are not 'founded' upon the agreement but upon the command of the court. Moreover, whatever doubts might remain as an original matter, the matter is one in which the Tax Court's ruling should be highly persuasive, if not controlling, even if it were not backed up by the support of two decisions of circuit courts of appeal."

The gift tax statute (Sections 1000, 1002) does not contain the exemptions or limitations of the estate tax statute. Nevertheless, upon the principle that the estate tax and the gift tax are in *pari materia* and must be construed together, the same exemption must be applied to the gift tax, and payments in satisfaction of an indebtedness arising out of a judgment of a court are not taxable gifts. In the case of *Commissioner* v. *Converse* (C. A. 2, 1947), 163 F. 2d 131, 133, the court so held expressly as follows:

"But there was a subsequent agreement made during the trial of the divorce action which no doubt was a fac-

tor in influencing the court to enter the judgment requiring the payment here involved. Yet that was but one of the factors, the others being the evidence introduced and considered by that court in reaching its decision as to the amount of the money judgment. When that decision was reached and that judgment was entered, the respondent was bound by it and liable upon it as the judgment of a court which had jurisdiction, for the jurisdiction of the Nevada court is not only apparent but is, indeed undisputed.

That judgment then became enforceable and was a debt respondent owed. Had he died before he paid it, it would not only have been collectible out of his estate but, what is even more significant for present purposes, it would, when paid, have been a deductible claim for estate tax purposes. *Commissioner* v. *Maresi*, 2 Cir., 156 F. 2d 929, 72, 542 P-H 1946 Fed. The underlying reason for taxing as gifts transfers made only in consideration for the release of marital rights in accordance with antenuptial agreements, as shown by the *Wemyss* and *Merrill* cases, is that the estate and gift tax statutes are in *pari materia*. *Sanford's Estate* v. *Commissioner*, 308 U. S. 39 (23 A. F. T. R. 56). Where, as here, there was the discharge of a money judgment which, had it remained unpaid until it became a debt against the respondent's estate, would have been allowed as a deductible claim in computing an estate tax, the transfer which discharged that debt during the respondent's life is not taxable as a gift. On the contrary it was the payment of a liquidated debt created by the judgment and the discharge thereby of the respondent's obligation to pay that debt was an adequate and full consideration in money or money's worth for the transfer."

In *Moore* v. *Commissioner*, 10 T. C. 393, 397, *en banc* (1948), the court held:

> "Here, the separation agreement was ratified and confirmed by the Nevada court which dissolved the marriage, and the agreement was declared by the court to be fair, just and equitable to the parties and to their minor child. The payments required of Albert V. Moore and the setting up of the insurance trust were made, therefore, pursuant to court decree and in discharge thereof. Had petitioner failed or refused to make the transfers, he could have been required to do so by court proceedings to enforce the terms of the decree. The discharge of the judgment, was under *Commissioner* v. *Converse, supra*, an adequate and full consideration in money or money's worth for the transfers."

In *Commissioner* v. *Estate of Barnard* (C. A. 2, 1949), 176 F. 2d 233, Mrs. Barnard and her husband had entered into a separation agreement in August 1943, whereby Mrs. Barnard agreed to pay her husband $50,000 for a release of any claims by him to any interest in her estate upon her death. The $50,000 was paid at the time of the execution of the agreement in August, 1943. In October 1943, Mrs. Barnard obtained a divorce in Nevada. The decree ratified, adopted and approved the agreement, which was incorporated in the decree, and declared it to be fair and equitable to the parties. The Court of Appeals held that the payment was made under the agreement and not under the decree because, said the court at page 236:

> "In the instant case, however, the payment was made according to the terms of the agreement, before Mrs. Barnard had decided to bring divorce proceedings."

In *Krause* v. *Yoke* (D. C. W. Va. January 13, 1950), 89 F. Supp. 91, cited in the respondent's brief in opposition to the petition for certiorari herein, the court likewise decided that since the transfers were made under the agreement before the entry of the divorce decree, they were not made under the decree but under the agreement. The court further held that even if the payments were made after the entry of the decree, since the decree merely approved the agreement and made no order or direction to make any transfers, such transfers would still be founded on the agreement. The court said at page 98:

> "The decree sets forth that the trusts had been consummated and delivered, and that the property had been transferred thereunder, and that plaintiff had already transferred the cash and other assets directly to his wife. The decree did not order plaintiff to make any conveyances, but only recited that they had already been made. The divorce court merely approved the settlement already made, and therefore the transfers made in carrying out the agreement of the Indenture of Second Trust were made pursuant to that agreement and not pursuant to a divorce decree. This would be true even though the transfers were made subsequent to the entry of the decree because the plaintiff was not ordered or directed to make any transfers. Since the court did not make an order directing compliance with the agreement, it cannot be said that the taxed transfers were made pursuant to the court's decree."

In the instant case, the agreement was entered into for the purpose of the decree and was to have no validity if such decree was not entered in the pending action. The decree specifically ordered and directed the petitioner to

make the transfers. The decision in *Krause* v. *Yoke, supra,* is thus an authority for the petitioner.

In *Hooker* v. *Commissioner* (C. A. 5), 174 F. 2d 863, 865, affg. 10 T. C. 388, heretofore cited by the respondent, the court sustained the taxability of the transfer as a gift because it held that the divorce court did not have jurisdiction to decree the complicated family property settlement which was there decreed. But in so holding the Court of Appeals held, however, with respect to the provisions as to which it held the divorce court had jurisdiction, that transfers made under its decree were not taxable gifts. The court said:

> "The divorce court, having jurisdiction to fix alimony for the wife and support for the children, could thereby bind the United States in respect of their proper amount, but it probably would have had no jurisdiction to decree the future settlement of the family property in trusts of the complicated sort agreed upon."

Here, the divorce court did have jurisdiction under the Nevada statute (Section 9463) to decree the property settlement which it did. The *Hooker* case is thus, likewise, an authority for the petitioner.

B.

The Commissioner, although himself relying on the decision of this Court in *Merrill* v. *Fahs, supra,* holding that the term "adequate and full consideration" as qualified in the estate tax statute, must be similarly qualified in the gift tax statute, since they are in *pari materia,* nevertheless strangely urged the Court of Appeals (Brief, p. 37), that its holding in the *Converse* case, that another qualification of the same term was, likewise, under compulsion

of *Merrill* v. *Fahs*, similarly applicable to the gift tax, was erroneous and should be overruled. The Court of Appeals, however, did not alter this holding.

In *Merrill* v. *Fahs*, the estate tax statute, by amendment, added a provision that a relinquishment of dower and other marital rights shall not be deemed to any extent a consideration in money or money's worth. The gift tax statute does not contain such provision, but requires merely that there be an adequate and full consideration in money or money's worth. The majority of this Court (324 U. S. 312, 313) cited H. Rep. No. 708, 72d Cong. 1st Sess. page 47 and S. Rep. No. 665 72d Cong. 1st Sess. page 50, stating that the amendment to the estate tax was merely a clarifying amendment and said in the majority opinion:

> "Without this specific provision Congress undoubtedly intended the requirement of adequate and full consideration to exclude relinquishment of dower and other marital rights with respect to the estate tax. Commissioner of Internal Revenue v. Bristol (CCA 1st) 121 F. (2d) 129; Sheets v. Commissioner of Internal Revenue (CCA 8th) 92 F. (2d) 927.
>
> We believe there is every reason for giving the same words in the gift tax the same reading."

The amendment to the estate tax, dealing with relinquishment of dower etc., was enacted by Section 804 of the Revenue Act of 1932. The amendment concerning liabilities imposed by law was made by Section 805 of that Act. Both Sections 804 and 805 of the 1932 Act amend Section 303 of the Revenue Act of 1926. The respective Congressional Committee Reports with respect to Section 805 immediately follow those dealing with Section 804 and both amend-

ments deal with qualifications and limitations to and exemptions from the requirement of "adequate and full consideration." Here, too, the amendment is merely a "clarification of existing law." (H. Rep. 708 p. 48 and S. Rep. 665 p. 51, 72d Cong. 1st Sess.) Paraphrasing the language of the majority opinion in *Merrill* v. *Fahs,* above quoted, with respect to this amendment: "Without this specific provision, Congress undoubtedly intended the requirement of 'adequate and full consideration' to apply only to liabilities founded on contract and not to liabilities imposed by law with respect to the estate tax. We believe there is every reason for giving the same words in the gift tax the same reading."

Both provisions are thus mere clarifying amendments to Section 303 of the Revenue Act of 1926 to assure the application of the always intended qualifications and limitations to the term "adequate and full consideration" in the statute. Both provisions are now contained in Section 812 b (5) of the Internal Revenue Code. Thus, if, as this Court has held in *Merrill* v. *Fahs,* one part of a subdivision of an estate tax statute is in *pari materia* with the gift tax statute then all of it is in *pari materia.* For, it could not conceivably be held that one part of the same subdivision of a statute is in *pari materia* and another portion is not.

The holding in the *Converse* case that this provision in Section 812 b (5) is in *pari materia* with the gift tax and must be read into it, is thus implicitly required by the decision of this Court in *Merrill* v. *Fahs,* as the Court of Appeals has held. This holding in the *Converse* case could not, therefore, be overruled without overruling *Merrill* v. *Fahs* itself.

The holding of the majority of this Court in *Merrill* v. *Fahs, supra* (324 U. S. 308, 311, 313) that the gift tax is in *pari materia* with the estate tax and that the two taxes should not be interpreted differently "where obvious reasons do not compel divergent treatment" followed *Sanford* v. *Commissioner,* 308 U. S. 39, 42, 44, wherein this Court said:

> "In ascertaining the correct construction of the statutes taxing gifts, it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death * * *."
>
> "* * * The gift tax was supplementary to the estate tax. The two are in pari materia and must be construed together. *Burnet* v. *Guggenheim, supra* (288 U. S. 280, 77 L. Ed. 751, 53 S. Ct. 369). An important if not the main purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property inter vivos which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfer at death."

In *Commissioner* v. *Wemyss, supra* (324 U. S. 303, 307), this Court said:

> "The section taxing as gifts transfers that are not made for 'adequate and full (money) consideration' aims to reach those transfers which are withdrawn from the donor's estate."

In *Commissioner* v. *Bristol* (C. A. 1), 121 F. 2d 129, 136, cited in *Merrill* v. *Fahs, supra,* the court said:

> "The provisions of the revenue act imposing the gift tax have always been interpreted by reference to the complementary estate tax."

This language in the *Bristol* case was "adopted" by the Solicitor General at page 49 of his brief in this Court in *Merrill* v. *Fahs*.

See also:

Hesslein v. *Hoey* (C. A. 2), 91 F. 2d 954, 956, cert. den. 302 U. S. 756;

2 Paul Federal Estate and Gift Taxation (1942 Ed.) page 962.

Since liabilities founded on a court decree are deductible claims from and not a part of a decedent's estate, transfers which discharge such debts during his life are not taxable gifts. There is in such case no estate tax avoidance, the prevention of which is the fundamental purpose of the gift tax enacted in *pari materia* with the estate tax to supplement it. This is the holding of the Court of Appeals in the *Converse* case (163 F. 2d 133), which based such holding on the decisions of this Court in the *Wemyss* and *Merrill* cases.

C.

Under the decision of the *Converse* and *Maresi* cases and other cases which they follow, the judgment and decree of the Nevada court, whose jurisdiction is undisputed, obligated the petitioner to make the transfers specified therein. These transfers were therefore not taxable gifts, but were made in discharge of a liquidated debt founded on an obligation imposed by law by virtue of the court decree. The discharge of such liability was, under the applicable statutes, an adequate and full consideration in money or money's worth for the transfer.

The Court of Appeals, in this case, however, declined to follow its decisions in the *Maresi* and *Converse* cases. The reason for such refusal is that the agreement in this case

provided that it should survive the decree (R. 18), and that this distinguished it from those cases. The court thus gave a wholly unwarranted effect to an incidental provision in the agreement.

Agreements incorporated in divorce decrees are usually separation agreements previously entered into by the parties. Even in the absence of a provision that the agreement shall survive the decree, the law is generally, as the Court of Appeals itself says (R. 30-31; 178 F. 2d 865), that the separation agreement survives the decree. As stated in *Miller* v. *Miller* (C. A. 10, 1943), 134 F. 2d 583, 587, cert. den. 320 U. S. 744:

> "It is equally well established by the same authorities that a separation agreement, otherwise valid and enforceable, is not extinguished, but survives a subsequent divorce and alimony decree. And if presented to the divorce and alimony court, its validity and enforceability is adjudicated and its terms superseded and annulled only to the extent of the conflict with the judgment of the divorce or alimony court, which cannot be hampered or circumscribed by the agreement of the parties touching a division of the property, or the award of alimony."

As we have seen, above, the parties were required to submit the agreement to the court, and it was the court's duty to make an investigation and adjudicate the property rights of the parties. This the court did. It not only approved the agreement, but it specifically decreed that the taxpayer make the "payments provided for in paragraphs 3 and 8" thereof (R. 23).

By the provision that the agreement shall survive the decree, the court could not and did not intend that the decree should be an empty gesture which nullified itself, for not

only is it inconceivable that the court would do this, but in a matrimonial litigation it could not do so, nor could it in any way in such action, permit the parties to usurp the function of the court.

The provision that the agreement survive the decree was plainly inserted merely for convenience in enforcing the decree. The husband was a resident of New York (R. 10), and the wife might in the future reside outside of Nevada. It would therefore be a convenience in enforcing the provisions of the decree which incorporated the terms of the agreement, if recourse for that purpose could be had merely to the agreement, without having to pursue the more cumbersome method of enforcing a foreign judgment, particularly in the case of a matrimonial judgment, where a number of provisions other than mere money payments might require enforcement. The necessity of resort to the Nevada court to enforce the provisions of the decree in the future would thus be obviated. This provision was particularly necessary here to accomplish that purpose, for this agreement was not a separation agreement but one entered into solely for the purposes of the decree in the pending action and was to be ineffective unless a divorce decree was entered, unlike the usual separation agreement which exists independently of a divorce and irrespective thereof.

This question has been determined by the Court of Appeals of the State of New York, in *Schacht* v. *Schacht*, 295 N. Y. 439. The question arose in the following manner:

In *Hoyt* v. *Hoyt*, 265 App. Div. 223, leave to appeal denied 290 N. Y. 931, the action was on an agreement which had been incorporated and approved in a Nevada decree which provided that the parties "perform each and every act required by the said agreement." The court held that notwithstanding that the action was on the agreement, the decree of the Nevada court controls any question arising

thereunder and that nothing could be asserted under the agreement in the New York court which would impair or affect anything adjudicated in the Nevada decree which incorporated the terms of the agreement, and that relief must be sought in the Nevada court under the decree.

The agreement in the *Hoyt* case did not contain a provision that it should survive the decree. In the subsequent *Schacht* case, *supra*, the agreement did contain such provision. The action was instituted in the Supreme Court of New York, and it was urged that the provision that the agreement was to survive the decree distinguished it from the *Hoyt* case. The court, however (54 N. Y. S. (2d) 515), dismissed the complaint on the authority of the *Hoyt* case. The Appellate Division, Second Department, reversed by a divided vote of three to two. The majority and dissenting opinions read as follows (270 App. Div. 850):

> "* * * The separation agreement, by its terms, survived the entry of the divorce decree in the Nevada action, and neither party was thereby deprived of any rights thereunder, or of the usual remedies for breach of any contractual obligations thereby provided. (*Goldman* v. *Goldman*, 282 N. Y. 296; *Schmelzel* v. *Schmelzel*, 287 N. Y. 21.) Since such rights exist, independently of the judgment entered in the Nevada court, we see no reason why this action may not be maintained to terminate such rights, since the Nevada judgment will not be affected by any judgment which may be entered in this action. The judgment in the Nevada action is not conclusive since the two causes of action are different, not only in form, but in the rights and interests affected. The estoppel is limited in such circumstances to the points actually determined. The issue involved in the present action was not involved in the action brought by plaintiff in the Nevada court, and a judgment here will not destroy

rights or interests established in that action. (Cf. *Schuylkill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N. Y. 304.) We do not consider *Hoyt* v. *Hoyt* (265 App. Div. 223) an authority to the contrary. The fraud alleged as a defense to the agreement which was the subject of the *Hoyt* action (supra) was with respect to matters which could have been litigated in the Nevada court. Moreover, in that case it was urged that the agreement had merged in the Nevada judgment of divorce. Lewis, P.J., Hagarty and Nolan, JJ., concur; Carswell and Adel, JJ., dissent and vote to affirm, with the following memorandum: *The provision that the agreement was to continue in full force and effect and survive any judgment or decree should not create any distinction between this case and Hoyt* v. *Hoyt.* (*265 App. Div. 223*). *The sole and only discernible purpose of that provision was to enable the wife to enforce payments thereunder in the event that the husband breached his obligations under the decree, which were identical with those under the agreement. The existence of that provision created no other or different rights.* It should not be said that the agreement which survives solely for enforcement also survives for destruction, that is for the purpose of enabling the wife to have it declared void as the product of fraud. To declare the agreement a nullity, assuming plaintiff were to prevail, would give rise to no rights in the plaintiff in respect of support other than those contained in the divorce decree which she obtained. To have her rights increased she must have the decree modified. Nullifying the agreement would be a futility in respect of the practical and final objective which she must attain to obtain any benefits. The place to accomplish the nullification of these provisions is in the State where the judgment was entered

and which incorporated the agreement therein." (Emphasis supplied.)

The Court of Appeals of the State of New York, however, unanimously reversed the Appellate Division and sustained the minority opinion in that court declining to give any effect to the incidental provision as to survivorship as thereby founding the rights and liabilities of the parties on the agreement, as follows (*Schacht* v. *Schacht*, 295 N. Y. 439, 442):

> "Shortly after the making of the separation agreement, the marriage of the parties was dissolved by a Nevada court as the result of a suit brought by the plaintiff in which the defendant entered a general appearance. Conformably to the allegations in the plaintiff's divorce complaint which described the separation agreement of April 6, 1944 as being 'just and fair in all respects,' the Nevada court in its decree gave this direction: 'IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the written agreement entered into between the parties, dated April 6, 1944, purporting to adjust and settle all matters pertaining to the * * * support and maintenance of the minor Child of the parties * * * and the support and maintenance of the plaintiff, be, and the same is hereby ratified, approved, confirmed and adopted by the Court, and by reference made part of the Court's decree, and both parties are hereby ordered and directed to comply with the terms and conditions thereof.'
>
> These provisions of the Nevada decree and the rights and interests established thereby would be substantially impaired by the judgment which the plaintiff demands in the present action. The issue which she now tenders was expressly adjudicated by the

Nevada court at her behest. No claim is made that the Nevada court lacked jurisdiction or that it was misled in any way. In these circumstances, the plaintiff is precluded from maintaining the present action (see *Hoyt* v. *Hoyt*, 265 App. Div. 223, and the cases there cited; 2 Freeman on Judgments (5th ed.), Secs. 631, 677)."

Thus, when the decree is entered, the rights of the parties are determined by the provisions thereof.

In *Lewis* v. *Lewis, supra*, 53 Nev. 398, 412; 2 P. 2d 131, 136, the court quoted with approval from *Herrick* v. *Herrick*, 319 Ill. 146, 152, 153; 149 N. E. 820, 824, wherein the court said:

"In entering the decree, the court is not controlled by the agreement of the parties respecting alimony, and may adopt or reject it, as seems consistent and proper from the situation of the parties as disclosed by the evidence. Warren v. Warren, 116 Minn. 458; 133 N. W. 1009. The fact that such stipulation is adopted by the court does not change the situation. * * * *After the decree was entered, the rights of the parties rested upon it and not upon the agreements.*" (Emphasis supplied.)

In *Knabe* v. *Knabe*, 176 Md. 606, 613; 124 A. L. R. 1317, it was stated:

"In fixing the amount of the allowance the court may, in lieu of testimony, accept the agreement of the parties upon the amount to be allowed, and incorporate it in the decree, if fairly made, and untainted by a collusive design to facilitate the procurement of a divorce (17 Am. Jur. 407; *Bushman* v. *Bushman*, 157

Md. 166, 170, 145 A. 488; *Dickey* v. *Dickey*, 154 Md. 675, 678, 141 A. 387; *Emerson* v. *Emerson*, 120 Md. 584, 87 A. 1033), but is not required to do so (17 Am. Jur. 408, 476, 495), and in any event, whether the agreement is or is not incorporated in the decree, the provisions of the decree and not those of the agreement conclusively establish the nature of the allowance (*Emerson* v. *Emerson*, 120 Md. 584, 596, 87 A. 1033), * * * "

Thus, the divorce court has the authority, power and duty to make any provision it deems proper, irrespective of the agreement of the parties. To the extent that the provisions of the agreement are identical with the provisions of the decree, they may be enforced as a convenience in enforcing such identical provisions in the decree. But the validity of the agreement and the continuance of its provisions for the purpose of enforcement depend upon the sanction of the decree, and the provisions may not be altered or invalidated except if the decree itself, from which the agreement derives any authority it may have, be so modified or invalidated.

In this case the agreement was not a separation agreement which stands on its own and has an independent validity when made.* The agreement herein was entered into solely for the purposes of the decree, and it was to have no validity at all unless sanctioned by such decree which was required by the Nevada statute to contain such property disposition.

The Court of Appeals, itself, recognizes that the obligations of the petitioner stem from the decree. For, in dis-

* When the petitioner and her husband separated in August, 1942, they had, in fact, entered into a separation agreement (Typewritten Tr. pp. 111, 112), which is not involved in or material to this case.

cussing the obligation of the petitioner to pay $416.66 per month to her husband for ten years, the Court of Appeals says (R. 31):

> "Once it became a contract *by entry of the decree*, since *thereupon* the taxpayer became *bound* to make all the payments * * *." (178 F. 2d 865.) (Emphasis supplied.)

The Court of Appeals concedes that the liability of petitioner to make the transfers is founded on the decree. It does not contend that the agreement by the provision as to survival is superior to the decree and does not deny that the decree controls and that the provisions of the agreement are dependent on and subject to the sanction of the decree. The Court of Appeals says however (R. 31):

> "Be that as it may, in the case at bar, the Nevada *decree* having declared that the agreement was 'entitled to be approved,' that included the provision that its 'covenants' should 'survive' as well as any of its other stipulations. Thus the payments made *under it* were 'founded' as much upon the promise or agreement as upon the decree; indeed, they were founded upon both; the parties chose to submit themselves to two sanctions—contempt under the divorce court and execution under the contract" (178 F. 2d 865). (Emphasis supplied.)

Thus, the Court of Appeals agrees that the decree determined what the right and liabilities of the parties were and that the "payments" were "made under it." The court further says that the decree directed that the agreement should survive and thereby the parties chose to submit themselves to two means of enforcing the payments to be "made under it." Thus, the Court of Appeals

gives to the survival provision precisely the effect which it was intended to have, namely an additional convenient means of enforcing the payments directed to be made under the decree. The Court of Appeals nevertheless contorted this provision in an effort to fit it to the words "founded on a promise or agreement" in Section 812b.

The parties in this divorce case could not assess their liabilities by agreement. The agreement was an accord which was required to be and was submitted to the court for its approval and its existence and the validity of its terms were conditional upon such approval in the decree in which the court was free to make its own provisions. Thus it was unquestionably the decree upon which such liabilities were founded.

Because the Nevada statute (Section 9463, *supra*), required the court to include a property division in its decree of divorce, the petitioner entered into an agreement, for the purposes of such decree, eliminating the disputed evidence on this issue from the litigation and submitting an accord thereon to the court for its consideration in making such required division in the decree. The petitioner made such agreement solely because the decree would entitle her husband to such a property division. She had no desire to make such a division unless so obligated by law to do so. Therefore, if the court decided that a decree of divorce should not be granted, there was to be no property division, since there was no intent, apart from a decree of divorce which compelled it, to enter into any property division at all. Accordingly, the agreement specifically provided that it was "of the essence" that it "not become operative" if no decree of divorce was entered in the pending litigation (R. 18). A decree of divorce was entered, and, as required by Nevada law, did make such property division as a part thereof.

Indisputably, therefore, the liabilities created are founded on the decree and not on the agreement which had no existence apart from the decree.

The Congressional purpose manifested in Section 812 b (5) was to apply the requirement of "adequate and full consideration" when the liability rested on no other foundation than the mere promise of the debtor and such promise was therefore, the only standard by which such liability had been measured. But where a court had adjudicated such liability and it was thus one "imposed by law," such measurement by the court was deemed by the statute to meet the requirement therein of an "adequate and full consideration" and the liability was exempt from such requirement.

The liability is just as much founded on the decree, where the decree provides that the agreement shall survive as where it is does not. The force of the decree is in no way diminished, affected or impaired by such provision. If the decree had approved the agreement but did not so provide for its survival, the Court of Appeals concedes that the liability which it created was intended by Section 812 b (5) to be exempted from gift tax. But the Court of Appeals holds that if the divorce court approved the same agreement and also provided that it survive, it was not so exempt. To say that this same liability which is in no way affected by a provision as to survivorship, is thereby affected by being deprived of the exemption afforded it by Congress, is to create an utterly unreal distinction and to ascribe strange reasoning to the enacters of the statute.

The vital and controlling fact is that the liability went for its creation beyond the agreement of the parties and was adjudicated by the decree. The decree specifically

adjudged that the petitioner make the transfers in discharge of the obligations assessed on her therein. This is the liability "imposed by law" which the framers of the statute contemplated. Even if the liability were, in addition, founded on the agreement, this would not eradicate the foundation of the decree, but, at most, it would be surplusage as more foundation than the statute required. Actually, the foundation on which the liability rests is the decree and any force which the agreement may possess likewise stems from the decree as the foundation thereof. The source to which we must look to ascertain the extent of the liability is the decree which brings it into being.

In any event, even if the liability can in any sense be said to be founded on the agreement, the holding of the Court of Appeals, that by having too much foundation the liability does not have enough, is a strange paradox indeed. Such holding is wholly at variance with the intent of Section 812 b (5), and cannot be sustained.

In the *Maresi* case, *supra*, the parties, prior to the institution of any divorce action, had entered into a separation agreement in which they settled their respective property rights and the claims of the wife and children to maintenance and support. The agreement contained even stronger provisions than those contained in this case.[7]

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[7] The agreement in the *Maresi* case provided as follows (Pet. Br. & App. p. 38):

"ELEVENTH: The parties hereto mutually covenant and agree that in the event that a decree of divorce shall be granted in favor of either party in any jurisdiction, that this agreement shall continue and remain in full force and effect and that the provisions of the same may be made a part of any divorce decree, if it be deemed convenient or necessary by either of the said parties and approved by the Court in which such proceedings for divorce may be brought. In the event that the said party of the first part shall at any time in the future institute

The decree adopted and approved the agreement and provided that the parties shall have only such rights against the property of estate of each other as are provided in the agreement.[8] The agreement in the *Converse* case contained a similar provision.[9]

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any action for separation or divorce against the said party of the second part in any jurisdiction, then she will not in any such action ask for, accept or receive either temporary or permanent alimony, counsel fees, costs or expenses, except as provided in this agreement.

TWELFTH: The parties hereto mutually covenant and agree that this agreement may be amended, modified or annulled by written agreement duly signed, sealed, acknowledged and delivered in the same manner as this agreement, but not otherwise * * *."

[8] The decree in the *Maresi* case provided as follows (Pet. Br. & App. p. 40):

"2. That the support of the plaintiff, and the care, custody, control, support, maintenance and education of Pompeo Henry Maresi, Sylvia-Fay Maresi, and Helen Maresi, the minor children of plaintiff and defendant; and the property rights of plaintiff and defendant be, and the same hereby are settled and decreed in accordance with the terms and provisions of the agreement between plaintiff and defendant, of date November 13, 1931; and further, the terms of the said agreement hereby fully are adopted, ratified and approved by the Court.

3. That neither plaintiff nor defendant shall have any right, claim or interest of any kind, nature or character whatsoever against the person, property or estate of the other, growing out of or that she or he might have acquired or may in the future acquire or possess by virtue of the marriage of plaintiff and defendant, save and except in accordance with the terms and provisions of the agreement between plaintiff and defendant, of date November 13, 1931."

[9] The agreement in the *Converse* case contained the following provision (Pet. Br. and App. p. 35):

"Nothing herein contained shall prevent or be construed to prevent either of the parties hereto from instituting or maintaining against the other an action for divorce.

The husband and wife agree that no application shall be made in any such action, or otherwise, inconsistent with any matter covered by this agreement."

In both the *Maresi* and *Converse* cases, the parties, the Tax Court and the Court of Appeals correctly deemed such provisions merely incidental and of no significance to the issue and accordingly ignored them. Thus in the *Maresi* case the court held (156 F. 2d 930) that the claim was not founded on a "promise or agreement" since "the divorce court was free to disregard any allowances made in the separation agreement" and therefore "the allowances were authentically its own even in cases where it expressly accepted as proper the allowances actually agreed upon."

In the *Converse* case, the parties entered into a separation agreement which provided that the husband pay to the wife $1250 per month for support and maintenance (Pet. Br. and App. p. 34). Mrs. Converse, thereafter, brought suit for divorce in Nevada and set forth the agreement in her complaint. The husband appeared and answered the complaint and alleged that a lump sum settlement would be fairer. The parties subsequently agreed at the trial to amend the agreement to provide for a lump sum settlement of $625,000. The trial court found that instead of making monthly payments of $1,250, the defendant shall pay a lump sum of $625,000 to the plaintiff "and said agreement will be amended accordingly" (Resp. App. p. 21). The decree of the court directed the defendant to pay to the plaintiff the sum of $625,000 in lieu of the monthly payments provided for in the agreement and further decreed "that the said written agreement • • • as amended by the above and foregoing paragraph be • • • ratified, adopted and approved and • • • declared to be fair, just and equitable • • • and plaintiff and defendant are ordered and directed to comply with the terms and conditions of said agreement" (Pet. Br. and App. p. 38).

The contention of the taxpayer in the *Converse* case with respect to the foregoing is set forth at page 12 of his brief in the Court of Appeals as follows:

> "The fact that the parties may have executed a separation agreement which the divorce court adopts by its decree does not make that decree any less the judgment of a court. The court which enters a decree of divorce is not executing the will of the parties to the proceeding before it, particularly in a marital matter, the agreement of the parties does not bind the court, which is free to accept or reject the parties' agreement. (*Lewis* v. *Lewis*, 53 Nev. 398; *Drespel* v. *Drespel*, 56 Nev. 368; *Fleming* v. *Yoke*, 53 F. Supp. 552, aff'd 145 F. (2d) 472.)"

The Court of Appeals (163 F. 2d 133) sustained such contention on authority of the *Maresi* case.

In this case also, during the pendency of the divorce action and a few days before the trial thereof, the parties reached an accord on the disputed issue on the trial of a property division. The fact that an agreement as to the lump sum in the *Converse* case, was apparently reached at the trial constitutes no practical difference from this case where it was reached a few days before the trial, for the purposes of the trial. In each case the agreement was submitted to the court, and in the *Converse* case, the court ordered the agreement of the parties amended as they had agreed, and approved the original agreement previously entered into as so amended by the parties. In both cases the court approved the agreement of the parties. In each case the decree specifically directed the taxpayer to make the specific payments agreed on by the parties to the action.

Here, as in the *Converse* case, the findings and decree of the court were made upon "said action coming on for trial upon the complaint of the plaintiff and the answer of the defendant, and evidence having been thereupon introduced in said cause, and the Court having been fully advised in the premises and having duly considered the law and the evidence" (R. 20, 22).

Thus, the Court of Appeals, could not, in view of the facts and its own holdings in the *Maresi* and *Converse* cases, consistently hold that the transfers by petitioner, herein, were not, under Section 812 b, "founded" on the decree. The court, however, did so and cast aside the provision for survivorship in the *Maresi* case by saying (R. 30):

> "It is true that the agreement did so provide, but we have examined the opinion of the Tax Court, and the briefs, and in neither was there any mention of that circumstance." (178 F. 2d 864.)

If the Court of Appeals had rested on this purported exception to the rule uniformly laid down in all the prior decisions, perhaps all that might be said would be that it had engrafted an exception on those rulings, which exception, as we have demonstrated, is without substance and cannot be sustained. However, the Court of Appeals went further in its discussion of its *Maresi* decision and, while nowhere saying that it overruled it, limited it in such a way that it must now be said to conflict with the decisions therein cited which it had followed as "sound," and as to which "the Tax Court's ruling should be highly persuasive if not controlling, even if it were not backed up by the support of two decisions of circuit courts of appeal." (156 F. 2d 930, 931.)

Thus the Court of Appeals here said of its *Maresi* decision (R. 29, 30):

> "We viewed the agreement, whose existence as a contract was conditional upon the entry of the decree, to be no more than a suggested compromise until confirmed, which the court might or might not choose to accept as the measure of the parties' obligations, and which became an obligation only by the decree. * * * The decision stands for no more than that, when the validity of the settlement is made conditional upon its adoption by the decree, and when it does not by its terms survive the decree, the payments are not 'founded' upon the 'promise or agreement.'" (178 F. 2d 864.)

The agreements in the *Maresi* and *Converse* cases were separation agreements. They were made prior to the institution of any divorce action and stood on their own. Their validity was not made conditional upon the entry of a divorce decree.[10] Indeed, such would not only be a strange provision in a separation agreement, but it would plainly be a self-vitiating provision which would invalidate the separation agreement as against public policy. The agreements in the cases of *Commissioner* v. *State Street*

[10] Indeed, instead of being "no more than a suggested compromise until confirmed" the agreement in the *Maresi* case provided that in any future separation or divorce action the wife would ask for no allowances other than those provided for in the agreement and the decree provided that the parties should not have any rights in the property or estate of the other, other than provided in the agreement (See footnotes 7 and 8, pages 71, 72 *supra*). The agreement in the *Converse* case provided that in any future divorce action, the parties would make no application inconsistent with the agreement (See footnote 9, page 72 *supra*). Such provisions however, as heretofore shown, have no force or effect on the Nevada court which has the duty and power to make its own provision, regardless of the agreement of the parties.

Trust Co., (C. A. 1) 128 F. 2d 618 and *Yoke* v. *Fleming*, (C. A. 4) 145 F. 2d 472, affg. 53 F. Supp. 552 were also separation agreements. Most agreements submitted to a divorce court are separation agreements entered into before the institution of a divorce suit. Such agreements are not made conditional on divorce, and since such underlying requisite is inapplicable thereto and is not laid down by the other decisions with which *Commissioner* v. *Maresi* was heretofore in accord, the *Maresi* case is now plainly in conflict with them. The effect of this holding by the Court of Appeals for the Second Circuit is that provisions in separation agreements made a part of the decree of divorce can under no circumstances be deemed to be founded on the decree.

The agreement in this case was so made conditional. It was not a separation agreement. It was never intended to stand on its own apart from the decree of divorce. It was made for the express purpose of the decree in the pending divorce action and therefore provided that it was to have no force or effect if no such decree should be entered (R. 18). This was thus no more than a suggested compromise to the court for its consideration in fixing the property disposition it was required to make under Section 9463 of the Nevada Compiled Laws, *supra*. Since the provisions therein proposed by the parties had no validity until made by the decree of the court, they plainly were "founded" on such decree which specifically adjudicated and assessed the obligations of the petitioner and specifically ordered her to make the specific transfers to her husband in discharge of such liability. They were nonetheless founded on such decree because in an incidental provision the agreement was permitted to survive as an aid in enforcing the provisions of the decree.

The unavoidable and controlling fact is that under the Nevada law, the court was required to make such property disposition in the decree of divorce. The court did so. The liabilities therein created are thus founded on such decree.

CONCLUSION

The judgment of the Court of Appeals, insofar as here reviewed, should be reversed and the decision of the Tax Court affirmed.

Respectfully submitted,

IRWIN N. WILPON
Counsel for Petitioner

September 1950

APPENDIX

Internal Revenue Code (26 U. S. C.)

Section 812. Net estate.

For the purpose of the tax the value of the net estate shall be determined in the case of a citizen or resident of the United States by deducting from the value of the gross estate.

* * * * *

(b) **Expenses, Losses, Indebtedness and Taxes:**

Such amounts:

* * * * *

(3) for claims against the estate,

(4) for unpaid mortgages upon or any indebtedness in respect of property where the value of decedent's interest therein undiminished by such mortgage or indebtedness, is included in the value of the gross estate, * * *

(5) * * * The deduction herein allowed in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded upon a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth; * * *

For the purpose of this subchapter, a relinquishment or promised relinquishment of dower, curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent, a consideration in money or money's worth.

Section 1000. Imposition of Tax.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001,

shall be imposed upon the transfer during any calendar year by any individual resident or nonresident of property by gift. * * *

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *

Section 1002. Transfer for less than adequate and full consideration.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Treasury Regulation 108

Section 86.2. Transfers Reached (a) In general.—The statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal or intangible. * * * Inasmuch as the tax also applies to gifts indirectly made, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See, further section 86.8. * * *

Section 86.8. Transfers for a consideration in money or money's worth.—Transfers reached by the statute are not confined to those only which, being without a valuable

consideration, accord with the common law concept of gifts, but embrace as well, sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc. is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

E. T. 19, 1946-2 Cum. Bull. 166, 168-169:

Advice has been requested concerning the application of the gift tax to transfers made pursuant to an agreement of the parties incident to a proceeding for divorce or legal separation.

• • • • •

The gift tax is supplementary to the estate tax. It taxes, to a large extent, transfers *inter vivos* which deplete the estate that the donor would otherwise leave at death. Taxability, therefore, under the gift tax of other than commercial transactions is said to be determined by, and to the extent of, absence of financial benefit to the transferor. (*Commissioner* v. *Wemyss*, supra; section 1002, supra.)

Under a decree of divorce or legal separation a husband's duty to support a divorced wife (alimony) customarily lasts only during the joint lives of the parties or until the divorced wife remarries. (Vernier, "American Family Laws," Volume II, 1932 and Supp. 1938.) The fulfillment, therefore, of this obligation by the husband merely amounts

to the liquidation of a presently existing obligation, the satisfaction of which does not have the effect of diminishing or depleting the husband's estate to any greater extent than the payment of other existing legal obligations. On the other hand, a transfer to a wife under such a decree in settlement of inheritance rights is a present transfer of what would otherwise constitute a major portion of the husband's estate on death.

The construction spelled out in section 812 (b), supra, governs the interpretation of the phrase "adequate and full consideration in money or money's worth" as that phrase is used in section 1002 of the Internal Revenue Code. (*Merrill* v. *Fahs*, supra.) The consideration for a transfer by way of property settlement other than relinquishment by the wife of her right to support and maintenance is the relinquishment by the wife of her marital rights in the husband's property or estate and falls squarely within the statutory provisions. Section 812 (b), however, makes no specific reference to support rights. It is the view of the Bureau that the surrender of support rights is not one of the "other marital rights" referred to in the section. The cases of *Meyer's Estate* v. *Helvering* (C. C. A. 2, 1940) (110 Fed. (2d), 367, certiorari denied, 310 U. S. 651) and *Helvering* v. *United States Trust Co. et al.* (C. C. A. 1940) (111 Fed. (2d), 576) will no longer be followed to the extent that they hold that the right of a divorced wife to support from a former husband during the joint lives of the parties is a marital right in his property or estate.

With respect to transfers made pursuant to legal separation agreements or divorce decrees, it is the position of the Bureau that, for both estate and gift tax purposes, a release of support rights may constitute a consideration in money or money's worth. Accordingly, to the extent that

a transfer does not exceed the reasonable value of the support rights of the wife it is to be treated as made for an adequate and full consideration in money or money's worth. The question whether the transfer is in excess of reasonable support rights is for the determination of the Bureau. That portion of any transfer which is allocable to the release by the wife of her property or inheritance rights is to be considered as not made "to any extent" for an adequate and full consideration in money or money's worth.

* * * * *

Nevada Compiled Laws, Section 9463 (as it read on March 6, 1943):

In granting a divorce the court may award such alimony to the wife and shall make such disposition of the community and separate property of the parties as shall appear just and equitable, having regard to the respective merits of the parties and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens, if any, imposed upon it for the benefit of the children. In the event of the death of either party, or the subsequent remarriage of the wife all alimony awarded by the decree shall cease, unless it shall have been otherwise ordered by the court.

If after the filing of the complaint, it shall be made to appear probable to the court or the judge in vacation that either party is about to do any act that would defeat or render less effectual any order which the court might ultimately make concerning the property or pecuniary interests, an order shall be made for the prevention thereof, to be enforced as such preliminary orders are enforced respecting children.

In the Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

No. ~~506~~ 14

CORNELIA HARRIS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statutes and other authorities involved	2
Statement	2
Argument	6
Conclusion	16
Appendix	17

CITATIONS

Cases:

Barnard, Estate of v. *Commissioner*, 9 T. C. 61	5, 10
Burnet v. *Brooks*, 288 U. S. 378	8
City Bank Farmers Trust Co. v. *Pedrick*, 168 F. 2d 618, certiorari denied, 335 U. S. 898	9
Commissioner v. *Barnard's Estate*, 176 F. 2d 233	10, 11, 12, 14
Commissioner v. *Bristol*, 121 F. 2d 129	11
Commissioner v. *Converse*, 163 F. 2d 131	13
Commissioner v. *Maresi*, 156 F. 2d 929	15
Commissioner v. *State Street T. Co.*, 128 F. 2d 618	15
Commissioner v. *Swink*, 155 F. 2d 723	15
Commissioner v. *Wemyss*, 324 U. S. 303	10, 11
Heiner v. *Colonial Trust Co.*, 275 U. S. 232	9
Hooker v. *Commissioner*, 174 F. 2d 863	12
Krause v. *Yoke*, decided January 13, 1950	12, 13, 15
Lusker v. *Commissioner*, 138 F. 2d 989	10, 11
Merrill v. *Fahs*, 324 U. S. 308, rehearing denied, 324 U. S. 888	7, 8, 9, 10, 11
Robinette v. *Helvering*, 318 U. S. 184	12
Rosenblum v. *Anglim*, 43 F. Supp. 889, affirmed, 135 F. 2d 512	9
United States v. *Stewart*, 311 U. S. 60	9
Yoke v. *Fleming*, 145 F. 2d 472, affirming *Fleming* v. *Yoke*, 53 F. Supp. 552	15

Statutes:

Internal Revenue Code:	
Sec. 812 (26 U.S.C. 1946 ed., Sec. 812)	8, 17
Sec. 861 (26 U.S.C. 1946 ed., Sec. 861)	7
Sec. 863 (26 U.S.C. 1946 ed., Sec. 863)	7, 8, 9, 18
Sec. 864 (26 U.S.C. 1946 ed., Sec. 864)	7

Statutes—Contd: Page

Sec. 1000 (26 U.S.C. 1946 ed., Sec. 1000) 7, 12, 18
Sec. 1002 (26 U.S.C. 1946 ed., Sec. 1002) 8, 12, 19
Sec. 1005 (26 U.S.C. 1946 ed., Sec. 1005) 19
Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 403 7
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 303..... 8
Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 804 8

Miscellaneous:

E. T. 19, 1946-2 Cum. Bull. 166 ..... 13, 22
Paul, *Federal Estate and Gift Taxation* (1946 Supp.):
Pp. 709-712 12
Pp. 711-712 11
Pp. 715-717 12
Rudick, *Marriage, Divorce and Taxes*, 2 Tax L. Rev. 123, 137, 162 (1947) 12
Treasury Regulations 108:
Sec. 86.1 ..... 12, 19
Sec. 86.2 ..... 12, 19
Sec. 86.4 20
Sec. 86.8 ..... 12, 20
Sec. 86.17 21
Sec. 86.18 21

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OPINIONS BELOW

The opinion of the Tax Court (R. 4-11) is reported in 10 T. C. 741. The opinion of the Court of Appeals (R. 33-41) is reported in 178 F. 2d 861.

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1949. (R. 42.) The petition for a writ of certiorari was filed on February 11, 1950. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether money deposited in American banks by or for a nonresident alien, not engaged in busi-

ness in the United States, is exempt from the gift tax as property without the United States.

2. Whether, under Sections 1000 and 1002 of the Internal Revenue Code and the applicable Treasury Regulations, the transfer by taxpayer to her husband of property in excess of $107,150 over that transferred by him to her, pursuant to a property settlement agreement which, one week later, was adopted by a Nevada court in a decree divorcing the parties, is taxable as a gift to the extent of the excess amount transferred.

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent statutes and other authorities involved are set forth in the Appendix, *infra*, pp. 17-24.

STATEMENT

The Tax Court made the following findings of fact:

Taxpayer was born an American citizen in New York City, on February 1, 1883. She became a British subject in 1903 through her marriage to Leland H. deLangley, a British subject. They were divorced in 1924, and three months later she married Reginald Wright, also a British subject, who was more than fourteen years younger than she was. They had no children. Taxpayer obtained a divorce from Wright in Reno, Nevada, on March 6, 1943. (R. 5-6.)

Taxpayer resided in England from 1903 until she and Wright came to the United States, on September 20, 1940. They came in order to get away

from the war in Europe and intended to return after the conclusion of the war. They did not dispose of their houses, one in London and one in Biarritz, France. They entered the United States on a temporary one year visa, permitting them to remain until September 20, 1941. That visa was renewed later for another year, which permitted them to remain until September 20, 1942. They resided in leased quarters at the Hotel Pierre in New York City until August, 1942, when taxpayer separated from Wright. Shortly thereafter she went to Reno, Nevada. She reclaimed her American citizenship there on November 21, 1942, and on March 6, 1943, was granted the divorce from Wright. (R. 6.)

In his brief in the Tax Court the Commissioner conceded that taxpayer was in the United States as a nonresident alien from September 20, 1940, until some time in September, 1942. (R. 6, 7.)

Taxpayer has never been engaged in business in the United States. She maintained several bank accounts in the National City Bank of New York in which she had money on deposit and on which an attorney at law held a power of attorney, made all deposits and drew checks on her behalf. The National City Bank was a corporation carrying on the banking business. (R. 6.)

Taxpayer gave Wright the following amounts from her accounts in the National City Bank during the period from September 20, 1940, to September, 1942: $29,095.91 during 1940, $76,170.59 dur-

ing 1941, and $39,455.18 during 1942. She also paid $1,800.03 in 1940, and $3,605.22 in 1941, from the same accounts as premiums on an endowment policy of insurance owned entirely by Wright. (R. 6-7.)

Taxpayer and Wright entered into a property settlement agreement on February 27, 1943. The net worth of taxpayer's estate was in excess of $1,000,000 at that time. The net worth of Wright's estate at that time was substantial. Each agreed to release completely the property of the other from all claims arising out of their marriage. Each transferred property of substantial value to the other. (R. 7.)

The Commissioner originally determined that the value of the property transferred to Wright exceeded that transferred to the taxpayer by $117,903.03. Before the Tax Court the Commissioner agreed that the difference was $107,150.78, including $41,291.88, representing the then value of her promise to Wright to pay $416.66 monthly for ten years. The Nevada court, in granting the divorce, approved the property settlement agreement and found that the payments of $416.66 per month were "in discharge of a legal obligation which, because of the marital relationship, has been imposed upon the plaintiff." (R. 7.)

The Commissioner determined deficiencies in gift taxes for the years 1940 to 1945, inclusive. (R. 5.) In addition, taxpayer filed claims for refund

of gift taxes which she had already paid for the years 1940, 1941 and 1942. By stipulation in the Tax Court, the parties disposed of a number of questions, eliminating entirely the deficiencies for the years 1944 and 1945 and part of the deficiencies which the Commissioner had determined for the years 1940, 1941, 1942 and 1943. (R. 5.) On the remaining questions presented to it for decision, the Tax Court ruled against the Commissioner with respect to the transfer made by taxpayer to her husband in 1943 pursuant to the property settlement agreement adopted one week subsequently in the divorce decree. This holding the Tax Court based entirely on the authority of its earlier decision in *Estate of Barnard* v. *Commissioner*, 9 T. C. 61 (R. 11), subsequently, however, reversed by the court below (176 F. 2d 233). This was the issue raised on the Commissioner's appeal to the court below and involved taxes in the approximate amount of $28,500.[1] (R. 12.)

The Tax Court, on the other hand, decided against the taxpayer on the issue submitted to it for decision, involving the years 1940, 1941 and 1942, holding that the transfers to Wright of money on deposit in the National City Bank were not exempt from the gift tax. (R. 7-10.) This was

[1] Since taxpayer had apparently paid the deficiencies determined by the Commissioner after the mailing of the deficiency notice, the decision of the Tax Court is expressed in terms of over payment in gift taxes determined to have been made. (R. 12.)

the only issue which taxpayer raised in her appeal to the court below and involved gift taxes amounting in the aggregate approximately to $16,272.

The findings and opinion of the Tax Court were rendered *en banc*. (R. 11.)

Upon the Commissioner's appeal, the court below unanimously reversed the Tax Court (R. 37-41); upon taxpayer's appeal, the court below affirmed in favor of the Commissioner (R. 34-37), Judge Swan dissenting. (R. 41.)

ARGUMENT

1. The decision of the majority of the court below against the asserted exemption from the gift tax of bank deposits in United States banks owned by an alien nonresident, not engaged in business in the United States, is plainly correct, and no reason is shown to warrant further review by this Court. There is no conflict between the decision below and that of any other court of appeals on the same matter, nor with applicable decisions of this Court. It is significant that, although the gift tax has been in effect since 1932, the exemption here claimed has, so far as is known, never before been asserted in nor passed upon by any court.

The opinions of the Tax Court (R. 7-10) and of Judge Learned Hand in the court below (R. 33-37) set forth with sufficient detail for present purposes the legislative history and the statutory basis for the ruling below, and amply establish that the failure by Congress to provide in the gift tax for an

exemption of deposits in American banks belonging to nonresident aliens not engaged in business in the United States, such as is explicitly provided for in the estate tax (Internal Revenue Code, Section 863 (b); Appendix, *infra*, p. 18), represented a deliberate and purposeful legislative choice.

Merrill v. *Fahs*, 324 U. S. 308, rehearing denied, 324 U. S. 888, upon which the taxpayer relies (Pet. 6-9), affords her no support. Indeed, the implication of that decision assists the Commissioner's argument here. The settled principle is not doubted that the gift tax is supplementary to the estate tax, that the two are in *pari materia*, and must be construed together.[2] Here, we contend that the phrase substantially identical to both taxes, namely, property "situated in the United States" (Internal Revenue Code: (estate tax) Sections 861 (a), 864 (a); (gift tax) Section 1000 (b) (Appendix, *infra*, p. 18)) is to receive identical construction, namely, to comprehend deposits of alien nonresidents in American banks. The estate tax was amended in 1921 expressly to except such deposits (Revenue Act of 1921, c. 136, 42 Stat. 227, Section 403 (b) (3)); the amendment was no mere clarifi-

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[2] While the prevention or compensation for avoidance of the estate tax is an important purpose of the gift tax, this is not its only purpose. Discouraging family distributions, so as to avoid high income surtaxes, is, for example, another recognized purpose. *Merrill* v. *Fahs*, *supra*, p. 313. The transfer here of more than $150,000 from a wife's bank accounts to her husband falls within that second aim of the gift tax.

cation or gloss of the existing language (*Burnet* v. *Brooks*, 288 U. S. 378, 388-389, 394-395), but an explicit exception of that which would otherwise have been taxed as property "situated in the United States." The exception was never carried over into the gift tax. On the other hand, in *Merrill* v. *Fahs, supra,* as this Court pointed out (pp. 312-313), even without the "specific provision" contained in the estate tax only,[3] Congress undoubtedly intended the language common to both taxes of "adequate and full consideration in money or money's worth" (Internal Revenue Code, Section 812 (b), Section 1002, Appendix, *infra,* pp. 17, 19) to exclude relinquishment of dower and other marital rights explicitly described in the specific provision peculiar to the estate tax. As the legislative history and the course of judicial decision discussed in the *Merrill* opinion demonstrate (p. 312): "Plainly, the explicitness was one of cautious redundancy to prevent 'subversion of the legislative intent.'"

Thus, the *Merrill* case presents a clear contrast to the statutory situation here, for the purpose of the specific provision involved in the instant case (Section 863 (b)) was to create an exception to the coverage comprehended in the language common to both statutes; not to repeat in different words or to

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[3] Section 303 (d) of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 804 of the Revenue Act of 1932, c. 209, 47 Stat. 169 now found in Section 812 (b) of the Internal Revenue Code.

clarify the common language. Here, as in the *Merrill* case, the common phrase received the same interpretation by the court below and the Tax Court, but an express exception to it contained in the estate tax, strictly to be construed as a tax exemption, was not extended by implication to the gift tax.[4] (R. 36.)

The court below and the Tax Court properly overruled taxpayer's argument that the omission of the exemption from the gift tax should be supplied by recourse to the purpose which actuated the exclusion in the estate tax. (R. 10, 36-37.) The economic consequences of the incidence of the gift tax and that of the estate tax are not identical, and Congress may have had many reasons for not regarding as appropriate in the one case an exception which it created in the other. It is unnecessary to speculate upon the nature of these reasons; it is sufficient to point out, as did Judge Hand, that the failure of Congress to provide in the gift tax an exemption which it had explicitly inserted in the estate tax was plainly an exercise of deliberate choice. Nor, in the face of the apparently deliber-

[4] Section 863(b), as a tax exemption, must be strictly construed in favor of the Government. *City Bank Farmers Trust Co.* v. *Pedrick*, 168 F.2d 618, 619 (C. A. 2d), certiorari denied, 335 U.S. 898; *Rosenblum* v. *Anglim*, 43 F. Supp. 889, 892 (N. D. Calif.), affirmed, 135 F. 2d 512 (C. A. 9th). Again, taxpayer rests her claim of a tax exemption upon mere inference or implication which this Court has repeatedly held to be inadmissible. *Heiner* v. *Colonial Trust Co.*, 275 U.S. 232, 235; *United States* v. *Stewart*, 311 U. S. 60, 71.

ate omission by Congress from the gift tax of any language appropriate to state the claimed tax exemption, is there any warrant to argue that a supposed slight and speculative advantage, which American life insurance companies might gain, affords sufficient basis for supplying the language eliminated, not only as applicable to life insurance, but additionally as to bank deposits, where no domestic advantage is perceptible. (R. 37.) Surely, this would pile tenuous inference on tenuous inference and in support of an alleged grant of tax exemption, where by settled law, all inference is inadmissible.[5]

2. In reversing the Tax Court on the Commissioner's appeal, the Court of Appeals applied here its recent decision in *Commissioner* v. *Barnard's Estate,* 176 F. 2d 233.[6] (R. 37-39.) Taxpayer asserts in her petition here (p. 12) that the decision of the court below in the *Barnard* case is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Lasker* v. *Commissioner,* 138 F. 2d 989. However, as the court below pointed out in the *Barnard* case (p. 236), its holding there was required by the applicable decisions of this Court in *Commissioner* v. *Wemyss,* 324 U. S. 303, and *Merrill* v. *Fahs,* 324 U. S. 308, rehearing de-

[5] See fn. 4, *supra*, p. 9.

[6] As noted in the Statement, *supra*, p. 5, the Tax Court had ruled against the Commissioner solely on the authority of its decision in the *Barnard* case, 9 T. C. 61 (R. 11), which however, pending the instant appeal, was reversed by the court below.

nied, 324 U. S. 888, both decided subsequent to the *Lasker* case, and which impliedly overruled the *Lasker* case. Accordingly, the purported conflict which taxpayer asserts is factitious, since it is with an overruled decision, no longer to be regarded as law.[7] Indeed, in approving in the *Wemyss* case (p. 307) and the *Merrill* case (p. 313) the decision of the First Circuit in *Commissioner* v. *Bristol,* 121 F. 2d 129, this Court there resolved the conflict with the *Lasker* case, upon which taxpayer relies here.

The decision of the court below in *Commissioner* v. *Barnard's Estate, supra,* was clearly in accord with the principles laid down by this Court in the *Wemyss* and *Merrill* cases. The argument that these cases can be distinguished because the transactions there involved were antenuptial settlements rather than postnuptial was properly overruled. (Pp. 235-236.) A transfer incident to a separation agreement or a family settlement upon marriage dissolution is plainly not a transaction made in the ordinary course of business. Such a property settlement is no less a mere family arrangement, i.e., not a usual commercial transaction, than an antenuptial contract. In both cases the parties may or

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[7] Moreover, the *Lasker* case may be distinguished from the instant case, since the court there understood the Commissioner to concede that the particular transfer in question was made in the ordinary course of business, and appears to have based its holding on that premise. (P. 991.) See criticism of the *Lasker* case in Paul, *Federal Estate and Gift Taxation* (1946 Supp.) 711-712.

may not be dealing at arm's length and the purpose of exacting a *quid pro quo* may or may not exist; under the settled construction of the statute these are superfluous, and thus false, issues. See also *Robinette* v. *Helvering,* 318 U. S. 184, 188; Paul, *Federal Estate and Gift Taxation* (1946 Supp.) 709-712, 715-717; Rudick, *Marriage, Divorce and Taxes,* 2 Tax L. Rev. 123, 137, 162 (1947). As the court below explained in the *Barnard* case (p. 235):

> This distinction without a difference seems to have developed in the Tax Court which early became committed to a different view — see *Jones* v. *Commissioner,* 1 T. C. 1207 — and then felt unwilling to accept what we think is the clear import of the Supreme Court's analysis. Accordingly in a series of decisions, of which the present is one, the Tax Court has applied this distinction. But this view has not been without dissent [in the Tax Court] * * *.

The reasoning of the Court of Appeals for the Fifth Circuit in *Hooker* v. *Commissioner,* 174 F. 2d 863, 866, decided shortly before the *Barnard* case, is to the same effect, and also the recent holding of the District Court in *Krause* v. *Yoke* (N.D. W.Va.), decided January 13, 1950 (1950 C.C.H. Federal Estate and Gift Tax Service, par. 10,750).

Hence, the mandate of Sections 1000 and 1002 of the Internal Revenue Code (Appendix, *infra,* pp. 18, 19), as authoritatively construed by this Court and the directions contained in Treasury Regulations 108, Sections 86.1, 86.2 and 86.8 (Ap-

pendix, *infra*, pp. 19-20), likewise approved by this Court, required the holding below that the property transferred by taxpayer to her husband, exceeding in value by $107,150 such adequate and full consideration in money or money's worth as she received from her husband therefor, be deemed a taxable gift.[8]

3. The instant record plainly sustains the court below in its holding that the taxed transfers (R. 40)—

> were "founded" as much upon the "promise or agreement" as upon the decree; indeed, they were "founded" upon both; the parties chose to submit themselves to two sanctions—contempt under the divorce court and execution under the contract.

Krause v. *Yoke, supra*, accords with the decision below. Analysis of the obligations created by the property settlement agreement (R. 16-25) and of the terms of the state court judgment (R. 30-32) establishes that the instant record differs from the situation presented by the earlier decision of the court below in *Commissioner* v. *Converse*, 163 F. 2d

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[8] Again, no provision for support of a wife or minor children is here involved, but on the contrary, extensive property transfers by a wife to a husband, where both parties were persons of substantial means. (R. 7.) While the Commissioner holds transfers by a wife in release of support rights to constitute adequate and full consideration, he has always insisted that the relinquishment of other rights, such as here, is not such consideration. E. T. 19, 1946-2 Cum. Bull. 166. (Appendix, *infra*, p. 22.)

131, whose holding in its opinion here (R. 39) and in the *Barnard* case, *supra*, p. 236, the court below clearly defined and distinguished. Here the property settlement agreement was carried out and the disputed transfers, instead of being creatures of the state court litigation and judgment, were by the agreement explicitly removed from the field of litigation. (R. 13, 37-40.) The parties contracted that the agreement should survive any decree which might be entered (R. 24), and the state court judgment itself expressly carried out this purpose by providing that (R. 31):

> Notwithstanding the approval of said agreement and the trust agreements forming a part thereof by the Court herein, IT IS ORDERED that said agreement and said trust agreements forming a part thereof shall survive this decree

and further that "the Court herein divests itself of all power to amend or modify the same [decree] in the future without the consent of both of the parties hereto" (R. 32). Again, while the agreement was to become effective only if and when a divorce decree was entered, its terms were not to be affected by the decree, which merely fixed the time when the agreement obligations would become operative. (R. 24.) Further, many detailed provisions of the agreement confirmed its independence of the decree, for they were to be performed prior to its entry. (R. 16, par. 3, R. 18-19, par. 6, R. 19, par. 7, R. 21, par. 9, R. 24, par 17.) The agreement

also certifies that the parties definitely had in view the probability and incidence of gift tax liability in connection with the transfers here involved. (R. 22-23, par. 13.)

The court below (R. 38-39) also defined its earlier holding in *Commissioner* v. *Maresi*, 156 F. 2d 929, where the estate tax was involved. Taxpayer urges as ground for certiorari in the instant case that this explanation by the court below of its prior decision in the *Maresi* case places the *Maresi* case in conflict with the estate tax cases of *Commissioner* v. *State Street T. Co.*, 128 F. 2d 618, decided by the Court of Appeals for the First Circuit; and *Yoke* v. *Fleming*, 145 F. 2d 472, and *Commissioner* v. *Swink*, 155 F. 2d 723, both decided by the Court of Appeals for the Fourth Circuit. (Pet. 17.) However, in none of these cases did the property settlement agreement of the parties by its terms survive a subsequent state court decree,[9] and, in

[9] In *Commissioner* v. *State Street T. Co.*, *supra*, p. 620, while there was some evidence that the parties reached some agreement prior to the decree, the record did not show clearly what that agreement was.

Moreover, *Yoke* v. *Fleming*, *supra*, was expressly affirmed by the Court of Appeals for the reasons which had been given in the opinion of the District Judge, 53 F. Supp. 552. Nevertheless, in *Krause* v. *Yoke*, *supra*, on reasoning analogous to that adopted here by the court below, the same District Judge distinguished the *Fleming*, *Swink* and *State Street T. Co.* cases, *supra*, and sustained a gift tax on the ground that the record in the *Krause* case established that the transfer there (as here) was founded upon the parties' agreement and not upon the divorce decree.

any event, these estate tax cases neither considered nor passed upon the point decided below. (R. 38-40.)

CONCLUSION

The decision of the court below is correct, and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
LEE A. JACKSON,
I. HENRY KUTZ,
Special Assistants to the Attorney General.

MARCH, 1950.

APPENDIX

Internal Revenue Code:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * * *

(b) *Expenses, Losses, Indebtedness, and Taxes.*—Such amounts—

* * * * *

(3) for claims against the estate,

(4) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate, * * *

* * * * *

as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or property taxes not accrued before his death, or any estate, succession, legacy, or inheritance taxes. The deduction herein allowed in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded upon a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth. * * *

For the purposes of this subchapter, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital

rights in the decedent's property or estate, shall not be considered to any extent a consideration "in money or money's worth."

* * * * *

(26 U. S. C. 1946 ed., Sec. 812.)

SEC. 863. PROPERTY WITHOUT THE UNITED STATES.

The following items shall not, for the purpose of this subchapter, be deemed property within the United States:

(a) *Proceeds of Life Insurance.* — The amount receivable as insurance upon the life of a nonresident not a citizen of the United States; and

(b) *Bank Deposits.*—Any moneys deposited with any person carrying on the banking business, by or for a nonresident not a citizen of the United States who was not engaged in business in the United States at the time of his death.

(26 U. S. C. 1946 ed., Sec. 863.)

SEC. 1000. IMPOSITION OF TAX.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift. * * *

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a non-resident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

(26 U. S. C. 1946 ed., Sec. 1000.)

SEC. 1002. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.
(26 U. S. C. 1946 ed., Sec. 1002.)

SEC. 1005. GIFTS MADE IN PROPERTY.

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.
(26 U. S. C. 1946 ed., Sec. 1005.)

Treasury Regulations 108, relating to the gift tax under the Internal Revenue Code:

SEC. 86.1 *Imposition of Tax.*—The statute imposes no tax upon property, but subjects to tax transfers of property by gift. * * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. (See section 86.8.) The tax applies to all individuals, whether resident or nonresident of the United States, but, in the case of a nonresident not a citizen, the tax applies only to transfers of property situated within the United States. For the definition of "resident", see section 86.4. With reference to the situs of property, see section 86.18.

SEC. 86.2. *Transfers Reached.*—(a) *In general.*—The statute imposes a tax whether the transfer is in trust or otherwise, whether the

gift is direct or indirect, and whether the property is real or personal, tangible or intangible. Thus, for example, a taxable transfer may be effected by the declaration of a trust, the forgiving of a debt, the assignment of a judgment, the assignment of the benefits of a contract of insurance, or the transfer of cash, certificates of deposit, or Federal, State, or municipal bonds. * * * Inasmuch as the tax also applies to gifts indirectly made, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See, further, section 86.8. * * *

SEC. 86.4 *Residence.*—The statute imposes the tax upon the transfer of property by gift made by any individual, resident or nonresident, but provides that in the case of a nonresident not a citizen of the United States the tax shall apply to a transfer only if the property is situated within the United States. (See section 86.18.) If the donor is a citizen of the United States, whether a resident or a nonresident thereof, or is a resident of the United States, whether or not a citizen thereof, the tax applies, regardless of where the property, whether real or personal, is situated.

SEC. 86.8. *Transfers for a Consideration in Money or Money's Worth.*—Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona

fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promises of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

SEC. 86.17. *Gifts Made in Property.*—A gift made in property is subject to the tax in the same manner as a gift of cash, and the amount of the gift is the value of the property at the date of the gift.

SEC. 86.18. *Situs of Property.*—The statute imposes a tax upon gifts made by citizens of the United States, residents or nonresidents thereof, and upon those made by residents of the United States, whether or not citizens, irrespective of whether the property transferred (real or personal, tangible or intangible) be situated within or without the United States. But gifts by nonresidents of the United States who are not citizens thereof (see section 86.4) are subject to tax only if the property transferred is, at the time of the transfer, situated within the United States.

Real estate, tangible personal property, and the written evidence of intangible personal property which is treated as being the property itself are within the United States if physically situated therein. For example, a bond for the payment of money is not within the United States unless physically situated therein. Stock of a domestic corporation, however, constitutes property within the United States, irrespective of where the certificates thereof are physically located. (See section 1030 (b) and section 86.74.) Intangible personal property the written evidence of which is not treated as being the property itself constitutes property within the United States if

consisting of a property right issuing from or enforceable against a resident of the United States or a domestic corporation (public or private), irrespective of where such written evidence is physically located.

* * * * *

'E. T. 19, 1946-2 Cum. Bull. 166, 168-169:

Advice has been requested concerning the application of the gift tax to transfers made pursuant to an agreement of the parties incident to a proceeding for divorce or legal separation.

* * * * *

The gift tax is supplementary to the estate tax. It taxes, to a large extent, transfers *inter vivos* which deplete the estate that the donor would otherwise leave at death. Taxability, therefore, under the gift tax of other than commercial transactions is said to be determined by, and to the extent of, absence of financial benefit to the transferor. (*Commissioner* v. *Wemyss,* supra; section 1002, supra.)

Under a decree of divorce or legal separation a husband's duty to support a divorced wife (alimony) customarily lasts only during the joint lives of the parties or until the divorced wife remarries. (Vernier, "American Family Laws," Volume II, 1932 and Supp. 1938.) The fulfillment, therefore, of this obligation by the husband merely amounts to the liquidation of a presently existing obligation, the satisfaction of which does not have the effect of diminishing or depleting the husband's estate to any greater extent than the payment of other existing legal obligations. On the other hand, a transfer to a wife under such a decree in settlement of inheritance rights is a present transfer of what would otherwise constitute a major portion of the husband's estate on death.

The construction spelled out in section 812 (b), supra, governs the interpretation of the phrase "adequate and full consideration in money or money's worth" as that phrase is used in section 1002 of the Internal Revenue Code. (*Merrill* v. *Fahs,* supra.) The consideration for a transfer by way of property settlement other than relinquishment by the wife of her right to support and maintenance is the relinquishment by the wife of her marital rights in the husband's property or estate and falls squarely within the statutory provisions. Section 812 (b), however, makes no specific reference to support rights. It is the view of the Bureau that the surrender of support rights is not one of the "other marital rights" referred to in the section. The cases of *Meyer's Estate* v. *Helvering* (C. C. A. 2, 1940) (110 F. 2d 367, certiorari denied, 310 U. S. 651) and *Helvering* v. *United States Trust Co. et al.* (C.C.A. 2, 1940) (111 F. 2d 576) will no longer be followed to the extent that they hold that the right of a divorced wife to support from a former husband during the joint lives of the parties is a marital right in his property or estate.

With respect to transfers made pursuant to legal separation agreements or divorce decrees, it is the position of the Bureau that, for both estate and gift tax purposes, a release of support rights may constitute a consideration in money or money's worth. Accordingly, to the extent that a transfer does not exceed the reasonable value of the support rights of the wife it is to be treated as made for an adequate and full consideration in money or money's worth. The question whether the transfer is in excess of reasonable support rights is for the determination of the Bureau. That portion of any transfer which is allocable

to the release by the wife of her property or inheritance rights is to be considered as not made "to any extent" for an adequate and full consideration in money or money's worth.

The establishment of a reasonable allocation is regarded as a proper matter for administrative determination by the Bureau in the absence of a reasonable allocation or segregation by the parties. In making this determination the facts and circumstances of each case will be separately considered. Elements to be considered are the amount of the husband's annual income, the extent of his assets, also, the life expectancies of the parties and the probability of the wife's remarriage, alimony almost universally being limited to such periods. An agreement of the parties may provide for payments extending beyond the period of their joint lives. The required allocation in such a case will involve a determination of the question whether the aggregate amounts paid and payable exceed normal support rights, which ordinarily would terminate upon the death of the husband. The contingency of the wife's remarriage may be measured by actuarial standards. (*Commissioner* v. *State Street Trust Co.*, (C. C. A. 1, 1942), 128 F. 2d 618; *Brotherhood* v. *Pinkston*, 293 U. S. 96 (1934); *Commissioner* v. *Marjorie D. Maresi, Executrix* (C. C. A. 2d), July 8, 1946, affirming, *Estate of P. M. Maresi*, 6 T. C., No. 74.)

With respect to the payment of the wife's counsel fees by the husband, the taxability as a gift of such payment is governed by whether the obligation is that of the husband or of the wife. To the extent that the husband is under obligation to pay the wife's legal fees in divorce or legal separation, the payments therefor are not taxable as gifts.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 14

CORNELIA HARRIS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	8
Argument:	
The transfer by taxpayer to her husband of property in excess of $107,150 over that transferred by him to her, pursuant to a property settlement agreement, shortly thereafter adopted in a Nevada court decree divorcing them, is taxable as a gift to the extent of the excess amount transferred	12
A. Property transfers under pre-divorce settlements are as much subject to gift tax as pre-marital transfers	12
B. Taxpayer did not receive "adequate and full consideration in money or money's worth" for the excess amount transferred	36
C. The transfer was founded upon and in satisfaction of obligations voluntarily assumed by the parties in their property settlement agreement	43
D. Alternatively, the transfer is taxable, even though the obligations of the property settlement agreement are not regarded as having survived the judgment	55
Conclusion	59
Appendix	60

CITATIONS

Cases:

Barnard, Estate of v. *Commissioner*, 9 T. C. 61 ..... 7, 13, 21, 25, 26, 29, 40

Beveridge v. *Commissioner*, 10 T. C. 915 32

Commissioner v. *Barnard's Estate*, 176 F. 2d 233 ..... 12, 13, 22, 23, 26, 28, 33, 35, 40, 43, 52, 53

Commissioner v. *Bristol*, 121 F. 2d 129 ..... 19, 24, 25, 36

Commissioner v. *Converse*, 163 F. 2d 131 ..... 28, 52, 53

Commissioner v. *Greene*, 119 F. 2d 383, certiorari denied, 314 U. S. 641 17

Commissioner v. *Maresi*, 156 F. 2d 929 ..... 54, 55

908399—50——1

Cases—Continued — Page

Commissioner v. *Mesta*, 123 F. 2d 986, certiorari denied, 316 U. S. 695 — 42
Commissioner v. *State Street T. Co.*, 128 F. 2d 618 — 54, 55, 56
Commissioner v. *Swink*, 155 F. 2d 723 — 54, 55
Commissioner v. *Wemyss*, 324 U. S. 303 — 12, 14, 17, 18, 19, 20, 22, 25, 28, 36
Converse v. *Commissioner*, 5 T. C. 1014 — 28, 29
Dobson v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231 — 36
Freeman v. *Sieve*, 323 Mass. 652 — 51
Goldman v. *Goldman*, 282 N. Y. 296 — 51
Harding v. *Commissioner*, 11 T. C. 1051 — 32, 33
Helvering v. *Fuller*, 310 U. S. 69 — 47
Hooker v. *Commissioner*, 174 F. 2d 863 — 31, 57
Hooker v. *Commissioner*, 10 T. C. 388 — 30, 56
Jones v. *Commissioner*, 1 T. C. 1207 — 21, 23, 26, 27, 29, 32
Krause v. *Yoke*, 89 F. Supp. 91 — 52, 55
Lahti v. *Commissioner*, 6 T. C. 7 — 29
Lasker v. *Commissioner*, 138 F. 2d 989 — 25, 26
McLean v. *Commissioner*, 11 T. C. 543 — 32
Merrill v. *Fahs*, 51 F. Supp. 120 — 25
Merrill v. *Fahs*, 324 U. S. 308, rehearing denied, 324 U. S. 888 — 12, 14, 19, 22, 25, 28, 36, 40, 42, 58
Mitchell v. *Commissioner*, 6 T. C. 159 — 29
Moore v. *Commissioner*, 10 T. C. 393 — 31
Robinette v. *Helvering*, 318 U. S. 184 — 23
Taurog v. *Commissioner*, 11 T. C. 1016 — 32, 33
Welch v. *Chapman*, 296 Mass. 487 — 51
Wright-Bernet v. *Commissioner*, 172 F. 2d 343 — 36
Yoke v. *Fleming*, 145 F. 2d 472 — 54, 55

Statutes:

Internal Revenue Code:
Sec. 812 (26 U. S. C. 1946 ed., Sec. 812) — 40, 56, 60
Sec. 1000 (26 U. S. C. 1946 ed., Sec. 1000) — 14, 36, 44, 61
Sec. 1002 (26 U. S. C. 1946 ed., Sec. 1002) — 14, 18, 36, 61
Sec. 1005 (26 U. S. C. 1946 ed., Sec. 1005) — 38, 61
Nevada Compiled Laws (1929), Sec. 3374 (as amended by Laws of Nevada (1935), c. 89, p. 194) — 47
2 Nevada Compiled Laws (1929), Sec. 3378 — 40
Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 320 — 18
Revenue Act of 1932, c. 209, 47 Stat. 169:
Sec. 501 — 14
Sec. 503 — 14
Sec. 805 — 56

Miscellaneous:

48 Columbia L. Rev. 152 (Jan. 1948) — 56
Consideration as Affecting Liability for Gift Tax, 174 A. L. R. 203, 206 (1948) — 35

Miscellaneous—Continued

	Page
E. T. 19, 1946—2 Cum. Bull. 166, 168–169	26, 39, 64
56 Harv. L. Rev. 314 (1942)	56
H. Rep. No. 708, 72d Cong., 1st Sess., pp. 8, 27, 28, 48 (1939—1 Cum. Bull. (Part 2) 457, 462, 476, 477, 491)	37, 43, 44, 56
24 Ind. L. J. 437 (Spring, 1949)	56
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Treasury Regulations 79 (1936 ed.):	
Art. 1	15, 16
Art. 2	16
Art. 8	20, 22, 26
Treasury Regulations 108:	
Sec. 86.1	15, 16, 17, 62
Sec. 86.2	17, 44, 62
Sec. 86.8	19, 22, 35, 37, 41, 63
Sec. 86.17	63
96 U. of Pa. L. Rev. 287 (Dec. 1947)	56
33 Va. L. Rev. 784 (1947)	56

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 14

CORNELIA HARRIS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Tax Court (R. 3–9) is reported in 10 T. C. 741. The opinion of the Court of Appeals (R. 24–32) is reported in 178 F. 2d 861.

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1949. (R. 33.) The petition for a writ of certiorari was filed on February 11, 1950, and was granted on March 27, 1950, limited to questions 2 and 3 presented by

the petition.[1] (R. 36.) The jurisdiction of this Court rests on 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether, under Sections 1000 and 1002 of the Internal Revenue Code and the applicable Treasury Regulations, the transfer by taxpayer to her husband of property in excess of $107,150 over that transferred by him to her, pursuant to a property settlement agreement which, one week later, was adopted by a Nevada court in a decree divorcing the parties, is taxable as a gift to the extent of the excess amount transferred.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and other authorities involved are set forth in the Appendix, *infra*, pp. 60–67.

STATEMENT

Taxpayer was born an American citizen in New York City, on February 1, 1883. She became a British subject in 1903 through her marriage to Leland H. deLangley, a British subject. They were divorced in 1924, and three months later she married Reginald Wright, another British subject. They had no children. (R. 4.)

Taxpayer resided in England from 1903 until she and Wright came to the United States on September 20, 1940. They came to get away

[1] Subsequently, rehearing of the petition for certiorari as to question 1 was denied on April 24, 1950 (339 U. S. 946).

from the war in Europe and intended to return there after the termination of hostilities. They entered the United States on a temporary one-year visa, permitting them to remain until September 20, 1941. That visa was later renewed for another year. They resided in leased quarters at a hotel in New York City until August 1942, when taxpayer separated from Wright. Shortly thereafter she went to Reno, Nevada, where she reclaimed her American citizenship on November 21, 1942, and obtained a divorce from Wright on March 6, 1943. (R. 4–5.)

Taxpayer maintained several bank accounts in the National City Bank of New York, and during the period from September 20, 1940, to September 1942, she gave Wright amounts aggregating $150,126.93[2] from these accounts (R. 5).

On February 27, 1943, one week prior to the Nevada divorce, taxpayer and Wright entered into a property settlement agreement. The net worth of taxpayer's estate was in excess of $1,000,000 at that time. The net worth of Wright's estate at that time was also substantial. Each agreed to release completely the property of the other from all claims arising out of their mar-

[2] $29,095.91 during 1940, $76,170.59 during 1941, and $39,455.18 during 1942. She also paid $1,800.03 in 1940 and $3,605.22 in 1941 from the same accounts as premiums on an endowment policy of insurance owned entirely by Wright. (R. 5.)

riage. Each transferred property of substantial value to the other. (R. 5.)

The Commissioner originally determined that the value of the property transferred to Wright exceeded that transferred to the taxpayer by $117,903.03. Before the Tax Court, however, the Commissioner agreed that the difference was $107,150.78, including the $41,291.88 representing the then value of her promise to Wright to pay $416.66 monthly for ten years. (R. 6.)

The property settlement agreement (R. 10–19) recited, among other things, that the parties had theretofore separated and had for some time been living apart; that a pending suit for divorce had been filed by taxpayer against Wright in the Nevada court and was being contested by him; and that (R. 11) "This agreement is made for the purpose of settling the respective property rights of the parties hereto and of removing the subject matter thereof from the field of litigation." Each party released and relinquished all rights that he or she might have, or thereafter acquire, to "share in any capacity whatsoever in the estate of the other party upon the latter's death * * *," and also mutually released each other as to all present or future claims and obligations, except those expressly provided in the agreement (R. 12–13, 16–17).

The agreement stated (R. 18) that it was

"executed for the purpose of effecting a settlement of the respective property rights of the parties hereto in the event a divorce should be decreed. This agreement shall be submitted to the court for its approval, but nevertheless *the covenants in this agreement shall survive any decree of divorce which may be entered.*" [Italics supplied.]

It was also agreed that (R. 18):

> It is of the essence of this agreement that the settlement herein provided for shall not become operative in any manner nor shall any of the Recitals or covenants herein become binding upon either party unless a decree of absolute divorce between the parties shall be entered in the pending Nevada action. The settlement herein provided shall become immediately effective and operative in the event of and upon the entry of a decree of divorce between said parties in said pending Nevada action. * * *

As to those "covenants" which it was provided were "to be performed by either of the parties prior to the entry of the decree * * *; the parties hereto, however, shall proceed as expeditiously as possible to carry [them] into effect * * *" (R. 18).[3]

[3] In general, neither husband nor wife was to be responsible for tax liabilities of the other by reason of any acts or

The Nevada court in its decision (R. 20–22), dated March 6, 1943, found *inter alia* (R. 21)—

> That under date of February 27, 1943, the plaintiff and defendant entered into an agreement and trust agreements forming a part thereof, under the terms of which the parties settled all obligations arising out of their marriage. The Court finds that the payments to be made by the plaintiff to the defendant, as set forth in paragraphs 3 and 8 of said agreement and the trust agreements forming a part thereof, are in discharge of a legal obligation which, because of the marital relationship has been imposed upon the plaintiff.

The judgment of the Nevada court (R. 22–23) approved the agreement, and adjudged (R. 23)—

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facts prior to the date of the agreement. However, it was expressly provided that (R. 17)—

"* * * The Wife shall be responsible for and shall make payment of all gift taxes that may be due or payable on any property, real or personal, which was transferred by the Wife to the Husband as a gift prior to the date of this agreement, or any gift taxes which may be due or payable by reason of any transfers pursuant to the terms of this agreement, or any gift taxes that may become due or payable in the future on any transfers which the Wife will make in the future pursuant to the covenants assumed by the Wife in this agreement. The Wife shall and does hereby save and keep the Husband safe and harmless from any liability for the nonpayment by the Wife of such gift taxes. The Wife shall not be responsible for gift taxes, if any, in connection with the real property located at Biarritz, France, and 21 Culross Street, London, England."

> * * * that the plaintiff pay to the defendant the payments provided for in paragraphs 3 and 8 of said agreement and the trust agreements forming a part thereof.

The judgment also stated (R. 23): "notwithstanding the approval of said agreement and the trust agreement forming a part thereof by the Court herein, It is ordered that said agreement and said trust agreements forming a part thereof shall survive this decree." The court (R. 23) also "ordered, adjudged and decreed that the decree herein entered is absolute and final in all respects and the Court herein divests itself of all power to amend or modify the same in the future without the consent of both of the parties hereto."

The Commissioner determined a gift tax deficiency for 1943 in part[4] based on the excess property in the amount of $107,150 transferred by taxpayer to her husband, pursuant to the property settlement agreement and the divorce decree (R. 4, 9, 24–25). This deficiency, approximating $28,500 in taxes, the Tax Court expunged in its decision *en banc* below (R. 9–10). In so ruling the Tax Court relied exclusively on the authority of its decision in *Estate of Barnard* v. *Commissioner*, 9 T. C. 61 (R. 9), which was subsequently, however, reversed by the court below (176 F. 2d

[4] Other issues involving the 1943 deficiency were eliminated by stipulation in the Tax Court (R. 4).

233). Upon the Commissioner's appeal here, the court below unanimously reversed[5] (R. 28–32).

SUMMARY OF ARGUMENT

1. A transfer is deemed a gift to the extent that it is not supported by an adequate and full consideration in money or money's worth. The court below properly held that no valid distinction in principle can be made between antenuptial property settlements and postnuptial agreements, following upon marital disputes. Congress intended to use the term "gift" in its broadest and most comprehensive sense; it dispensed with the common law test of donative intent and formulated a more workable objective test, namely, whether the transfer of property was for less than an adequate and full consideration in money or money's worth. The test is whether a transfer is gratuitous, not whether it is donative.

However, not every gratuitous transfer is taxable; the Treasury has interpreted the statute to except certain transactions made in the ordinary

[5] The Tax Court decided against taxpayer the issue involving taxes for the years 1940–1942, holding that the transfers to Wright of money from the National City Bank deposits were not exempt from the gift tax (R. 6–9). On this issue raised in taxpayer's appeal, the court below affirmed (R. 25–28), Judge Swan dissenting (R. 32). Taxpayer sought to raise this issue in Question 1 of its petition here and with respect to which certiorari was denied.

course of business. Genuine business transactions which involve bad bargains are by the controlling Regulations excepted from the tax, by treating as made for money consideration a "sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent)." This exception must, under familiar canons of construction, be given a narrow scope.

Clearly, a transfer incident to a separation agreement or a family settlement upon marriage dissolution is not a transaction made in the ordinary course of business. Such a property settlement is ordinarily as much a family arrangement as an antenuptial contract. In either case the parties may or may not be dealing at arm's length and the purpose of exacting a *quid pro quo* may or may not exist; but such circumstances, if present, are immaterial. Nevertheless, the Tax Court, although not without dissent, in a series of decisions of which the instant case is one, has applied these incorrect indicia.

2. Accordingly, the transfer here was taxable as a gift, unless taxpayer received adequate and full consideration in money or money's worth. However, she received no such consideration. Taxpayer was under no obligation to support her husband, and only release of marital rights in her estate was transferred to her under the

agreement, in consideration for the excess amount in the sum of $107,150, which she transferred to him. It is established that the relinquishment of such contingent property rights does not constitute consideration "reducible to a money value" for gift tax purposes. Certainly, consideration in money's worth is no more received, where property is transferred by wife to husband in return for release of marital rights in anticipation of divorce, than when such transfer is made prior to marriage. In both cases the property transferred *inter vivos* would have been taxed to her estate, if, instead, the transfer had been made after her death. The gap in the revenue laws, which the gift tax was designed to fill, exists in the one situation as the other.

3. The transfer here was founded upon and in satisfaction of obligations assumed by the parties in their property settlement agreement. An analysis of the obligations created by the agreement and of the terms of the divorce judgment establishes that both the agreement and the judgment guaranteed that the contract obligations subsisted independently of the judgment, survived it; and were not merged into it. Although formally submited to the court for approval, whether approved or not, the promised transfer was to be performed despite the provisions of any decree that the state court might make.

Performance of the transfer required under the agreement became binding upon taxpayer immediately upon entry of the divorce decree. Many specific provisions in the agreement confirm its independence of the decree and the parties' understanding that its terms were permanently obligatory and were not superseded by the judgment. The instant case is thus clearly distinguishable from cases where the existence and extent of an obligation by a spouse to make a transfer is in issue and is settled by litigation.

4. Alternatively, the transfer is taxable, even though the obligations of the property settlement agreement are not regarded as having survived the judgment. A state court seal should not be determinative of the meaning of consideration under federal tax statutes, and its judgment, in effect based on consent, should not *ipso facto* bind the Treasury, even where technically under state law the judgment has merged into and superseded the agreement. Moreover, all transactions, where property is gratuitously transferred, regardless of the means or device employed, are subject to gift tax. Where the device is a judgment directing a transfer in satisfaction only of marital rights in the taxpayer's estate, the tax is due irrespective of whether or not an agreement prior to judgment has been established.

ARGUMENT

THE TRANSFER BY TAXPAYER TO HER HUSBAND OF PROPERTY IN EXCESS OF $107,150 OVER THAT TRANSFERRED BY HIM TO HER, PURSUANT TO A PROPERTY SETTLEMENT AGREEMENT, SHORTLY THEREAFTER ADOPTED IN A NEVADA COURT DECREE DIVORCING THEM, IS TAXABLE AS A GIFT TO THE EXTENT OF THE EXCESS AMOUNT TRANSFERRED

A. *Property transfers under pre-divorce settlements are as much subject to gift tax as premarital transfers.*—In *Commissioner* v. *Wemyss*, 324 U. S. 303, and *Merrill* v. *Fahs*, 324 U. S. 308, this Court held the gift tax applicable to any transfer not made for "an adequate and full consideration in money or money's worth," irrespective of donative intent; and that relinquishment, prior to marriage, of marital property rights is not to be regarded as consideration in "money or money's worth" for gift tax purposes as well as for estate tax purposes. These rulings were in accordance with a fundamental legislative purpose of the gift tax, namely, to complement the estate tax by preventing tax-free depletion of the transferor's estate during his lifetime.

The question in the present case is whether the principles established in *Wemyss* and *Merrill* are inapplicable simply because the transfer here was made in connection with a post-nuptial, pre-divorce settlement. In *Commissioner* v. *Barnard's Estate*, 176 F. 2d 233, the Court of Appeals for the Second Circuit held that the rule of the *Wemyss* and *Merrill* cases applies equally to post-

nuptial transactions, and that the rationale of those cases is not limited by the fact that the transactions there involved were antenuptial settlements rather than post-nuptial. The court below stated in the *Barnard* case (pp. 235–236):

> This distinction without a difference seems to have developed in the Tax Court which early became committed to a different view—see *Jones* v. *Commissioner*, 1 T. C. 1207—and then felt unwilling to accept what we think is the clear import of the Supreme Court's analysis. Accordingly in a series of decisions, of which the present is one, the Tax Court has applied this distinction. But this view has not been without dissent; thus we regard the vigorous dissents of Judge Disney in cases such as *McLean* v. *Commissioner*, 1948, 11 T. C. 543; *Taurog* v. *Commissioner*, 1948, 11 T. C. 1016; and *Harding* v. *Commissioner*, 1948, 11 T. C. 1051, as stating the necessary and correct principles after *Merrill* v. *Fahs, supra*.

In the present case the Tax Court ruled against the Commissioner (R. 3) solely on the authority of its prior decision in *Estate of Barnard* v. *Commissioner*, 9 T. C. 61 (R. 9),* which, however, subsequent to its ruling in this case, was reversed

*In the Tax Court the Commissioner conceded that the facts of the instant case were not distinguishable from those in the *Barnard* case, but argued that the Tax Court's decision there was incorrect (R. 9).

by the court below. We submit that the application of the statute made by the court below in the present case and in *Barnard* was clearly correct and in accord with the principles established in the *Wemyss* and *Merrill* cases. The language of the governing Sections 1000 (a) and 1002 of the Internal Revenue Code (Appendix, *infra*, p. 61) quoted in the footnote,[7] is derived from and substantially identical with Sections 501 (a) and 503 of the Revenue Act of 1932, c. 209, 47 Stat. 169, which were involved in the latter cases. In its *Wemyss* opinion the Court said (p. 306):

> Sections 501 and 503 are not disparate provisions. Congress directed them to the same purpose, and they should not be separated in application. Had Congress taxed "gifts" *simpliciter*, it would be appropriate to assume that the term was used in its colloquial sense, and a search for "donative intent" would be indicated. But Congress

[7] SEC. 1000. *Imposition of tax.*—(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual * * * of property by gift. * * *

* * * * *

SEC. 1002. *Transfer for less than adequate and full consideration.*—Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

> intended to use the term "gifts" in its broadest and most comprehensive sense. H. Rep. No. 708, 72d Cong., 1st Sess., p. 27; S. Rep. No. 665, 72d Cong., 1st Sess., p. 39; cf. *Smith* v. *Shaughnessy*, 318 U. S. 176; *Robinette* v. *Helvering*, 318 U. S. 184. Congress chose not to require an ascertainment of what too often is an elusive state of mind. For purposes of the gift tax it not only dispensed with the test of "donative intent." It formulated a much more workable external test, that where "property is transferred for less than an adequate and full consideration in money or money's worth," the excess in such money value "shall, for the purpose of the tax imposed by this title, be deemed a gift. * * *"

Moreover, long standing Treasury Regulations discussed in the *Wemyss* case and approved by this Court "have emphasized that common law considerations were not embodied in the gift tax." (P. 306.) Section 86.1 of Regulations 108, here controlling, relating to the gift tax under the Internal Revenue Code, provides, in exactly the same terms as Article 1 of Regulations 79 (1936 ed.), relating to the gift tax under the Revenue Act of 1932, which was before this Court in the *Wemyss* case (Appendix, *infra*, p. 62):

> SEC. 86.1 *Imposition of tax.*—* * * The tax is not limited in its imposition to transfers of property without a valuable

> consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. * * *

The governing Regulations 108, promulgated in 1943, while otherwise substantially identical with Regulations 79 (1936 ed.), differ in one significant respect, further supporting the construction which this Court had reached on the language of the statute and Regulations 79, even without the aid of the explicit wording of Regulations 108.

Regulations 79 (1936 ed.) read:

> ARTICLE 1. *Imposition of tax.*—* * * The statute taxes all such transfers of property * * * *to the extent that they are donative in character* and exceed the deductions authorized by section 505, as amended. * * * [Italics supplied.]
>
> ART. 2. *Transfers reached.*—* * * Inasmuch as the tax also applies to gifts indirectly made, all transactions whereby property or property rights or interests are *donatively* passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. * * * [Italics supplied.]

On the other hand, the superseding Regulations 108 omitted all reference to "donative" character in Section 86.1, and substituted the word "gratuitously", *i. e.*, without consideration, for "do-

natively" in Section 86.2 as follows (Appendix, *infra*, pp. 62–63):

> SEC. 86.1 *Imposition of tax.*—* * * The statute taxes all such transfers of property * * * to the extent that they exceed the deductions authorized by section 1004. * * *
>
> SEC. 86.2 *Transfers reached.*—(a) * * * Inasmuch as the tax also applies to gifts indirectly made, all transactions whereby property or property rights or interests are *gratuitously* passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. * * * [Italics supplied.]

This revision was made in 194[illegible] prior to the decision in *Commissioner* v. *Wemyss*, 324 U. S. 303, and provides further proof that in applying the gift tax the test of "donative intent" is dispensed with.[8]

Thus, the statutory test, authoritatively settled by this Court, is not whether a transfer is donative, but whether it is gratuitous.[9] Ascertain-

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[8] Previously, the Ninth Circuit Court of Appeals had held, in *Commissioner* v. *Greene*, 119 F. 2d 383, 386 (1941), certiorari denied, 314 U. S. 641, that "donative intention is immaterial, because § 503 of the act in question does not require it."

[9] A "transfer" constituting a taxable "gift" under the statute comprehends sales and exchanges. The statute plainly contemplates, as held in the *Wemyss* case, the actuality of a "gift" despite the immediacy of "consideration"

ment of "an elusive state of mind" is thus avoided, and there is substituted a "much more workable external test", that is, the cost to the transferor; the excess of what he gives over what he receives, establishes and measures the gift.

As a corollary, benefit to the transferor is required to satisfy the statutory requirement of adequate and full consideration in money or money's worth. Detriment to the transferee is not enough. Thus, in the *Wemyss* case, this Court said (pp. 307–308):

> The section taxing as gifts transfers that are not made for "adequate and full [money] consideration" aims to reach those transfers which are withdrawn from the donor's estate. To allow detriment to the donee to satisfy the requirement of "adequate and full consideration" would

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of "value"; "gift" and "consideration" may co-exist simultaneously and though the transfer is one "for" the other, nevertheless, "for the purpose of the tax" the excess in value of the property transferred over such consideration is "deemed" a "gift." Section 1002, Internal Revenue Code. A sale or exchange was taxable as a gift even under the more limited provisions of the first gift tax. Revenue Act of 1924, c. 234, 43 Stat. 253:

"SEC. 320. * * * Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

violate the purpose of the statute and open wide the door for evasion of the gift tax.[10]

Gratuitous transfers of property which, thus, will forever escape the estate tax are subject to the gift tax; the decisive factor is objective, the decrease in the transferor's estate. Motive or intent in making the transfer, donative or otherwise, is of no consequence. However, not every gratuitous transfer is taxable, for despite the broad statutory language the Treasury has excepted certain transfers made in the ordinary course of business. The provisions of the governing Regulations 108, Section 86.8 (Appendix,

[10] Similarly, the Court of Appeals in *Commissioner* v. *Bristol*, 121 F. 2d 129, 133-134 (C. A. 1st, 1941), approved by this Court in *Wemyss* (p. 307) and *Merrill* (p. 313), reasoned as follows:

"Section 503, providing that a transfer shall be deemed a gift unless the transferor receives full and adequate *consideration* in money or money's worth, appears to mean that any transfer of property is to be treated as a gift to the extent that the tranferor does not receive in return an adequate and full *equivalent* in money or something which can be valued in money. 'Consideration', as used in Section 503, is not the same as common law consideration; it means that when the transferor gives something away and does not at the same time replace it with money of equal value or some goods or services capable of being evaluated in money, he is deemed to have made a gift within the taxing law. * * * To our mind, the purpose of this section in the gift tax statute and similar wording in sections of the federal estate tax law was to prevent the depletion of the transferor's or decedent's estate, unless a tax was paid on the transfer, by requiring that the transferor or decedent receive in exchange something of the same money value."

infra, p. 63) directly implement this rule, and in earlier identical form (Regulations 79, (1936 ed.) Art. 8) found approval and explanation by this Court in the *Wemyss* opinion, 324 U. S. 303, 306–307, as follows:

> To reinforce the evident desire of Congress to hit all the protean arrangements which the wit of man can devise that are not business transactions within the meaning of ordinary speech, the Treasury Regulations make clear that no genuine business transaction comes within the purport of the gift tax by excluding "a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is *bona fide*, at arm's length, and free from any donative intent)." Treas. Reg. 79 (1963 ed.) Art. 8. Thus on finding that a transfer in the circumstances of a particular case is not made in the ordinary course of business, the transfer becomes subject to the gift tax to the extent that it is not made "for an adequate and full consideration in money or money's worth."

Moreover, since Congress intended to use the term "gift" in its broadest and most comprehensive sense, it follows that those transfers which the Regulations except from the general requirement as to adequacy of consideration, are to be narrowly confined. Such a narrow construction is further confirmed by the fundamental purpose

of the gift tax (see pp. 36–37), to protect the estate tax by taxing as gifts *inter vivos* transfers which are withdrawn from the testator's estate without corresponding receipt of actual benefit.[11]

In deciding the *Barnard* case, *supra,* the Tax Court completely failed to apply these established principles of gift tax construction. It held that the transfer (9 T. C. 61, 67)—

> * * * was made without donative intent in an arm's length transaction for an adequate and full consideration in money or money's worth and that the respondent erred in subjecting it to the Federal gift tax.

These indicia, namely, "without donative intent in an arm's length transaction", clearly are

[11] In this connection, referring to *Jones* v. *Commissioner*, 1 T. C. 1207, Randolph Paul comments (Federal Estate and Gift Taxation (1946 Supp.) pp. 716–717):

"There is one factor which may perhaps be decisive, although the Tax Court fails to mention it. The estate tax statute has a carefully circumscribed concept of consideration in order to prevent the tax-free devolution of property, whether to a spouse or former spouse. Under the Tax Court's decision the policy of the estate tax statute may be circumvented by a similar disposition during one's lifetime, despite the purpose of the gift tax to prevent such tax-free avoidance. Once it is determined, as in the *Merrill* case, that the consideration concept of both taxes is similar despite the differences in precise statutory wording, it seems most desirable to make certain that the policy of the estate tax is not drained of effectiveness by a contrary reading of the gift tax. It is not sufficient to fall back simply on the element of donative intent introduced by the regulations for a limited purpose which is carefully hedged."

erroneous; where the transfer was gratuitous, in whole or in part, the test is whether the transfer was made in the ordinary course of business. If not made in the ordinary course of business, neither freedom from donative intent, *bona fides,* nor arm's length character would bring it within the exception stated in the Regulations and relieve the transfer from the gift tax. The holding in the *Wemyss* and *Merrill* cases and the language of Section 86.8 of the Regulations [12] clearly establish that *bona fides,* arm's length character and freedom from donative intent become relevant factors, only after it is first found that a transfer was made in the ordinary course of business. This, indeed, is the explicit ruling of the court below in the *Barnard* case, *supra,* 176 F. 2d 233, 236.

This Court said in *Merrill* v. *Fahs,* 324 U. S. 308, 313, fn. 1: "To find that the transaction was 'made in the ordinary course of business' is to

[12] Additional confirmation of this conclusion is found in the derivation of this exception. Its original expression in the 1933 edition of Regulations 79 read as follows:

"ART. 8. *Transfers for less than an adequate and full consideration.*—* * * A sale, exchange, or other transfer of property (see article 2) in the ordinary course of business, *where* the transaction is bona fide and at arm's length and free from any donative intent, shall be considered as made for an adequate and full consideration in money or money's worth." [Italics supplied.]

In Regulations 108, Section 86.8, as also in the 1936 edition of Regulations 79, before the Court in the *Wemyss* case, parentheses substitute for the word "where".

attribute to the Treasury a strange use of English." Similarly, here we contend that even though the transfers involved were not antenuptial in character, but property distributions incident to the dissolution of a marriage relationship, to find that the transaction was "made in the ordinary course of business" is to attribute to the Treasury a strange use of English and would require a factual conclusion inadmissible on the record.[13] Since valuable property interests are often involved, separation and divorce may indeed possess an economic or business aspect. However, this commonly is also one of the aspects of marriages, wills, and family settlements in general, which do not thereby become commercial transactions entered into in the ordinary course of business. Cf. *Robinette* v. *Helvering*, 318 U. S. 184, 187–188. In *Commissioner* v.

[13] See Paul, Federal Estate and Gift Taxation (1946 Supp.) 711, as follows:

"* * * Far too much is read into the regulations by assuming that a divorce settlement calling for a transfer from husband to wife is effected 'in the ordinary course of business.' The Treasury is clearly thinking in terms of the common commercial transaction which may result in a 'bad bargain' for one of the parties. Rarely, if ever, does a divorce settlement reflect one's ordinary course of business. * * *"

The quoted statement is made with particular reference to *Jones* v. *Commissioner*, 1 T. C. 1207 (1943), one of the Tax Court cases principally followed by that tribunal in its *Barnard* opinion, p. 67, which, in turn, the Court of Appeals questioned in its reversal of the *Barnard* case. See 176 F. 2d, 233, 235, quoted at p. 13, *supra*.

Bristol, 121 F. 2d 129, the Court of Appeals for the First Circuit characterized the antenuptial transfer there as "a purely business transaction," but, nevertheless, held it a taxable gift. Lawyers prepared the agreements involved in the *Wemyss, Merrill, Robinette* and *Bristol* cases; none was regarded as made in the ordinary course of business. Whether or not made at arm's length, all, as here, were family settlements, not commercial transactions entered into for profit in the ordinary course of business.

The motives for a gift need not be altruistic nor purely generous; indeed, they may often be business or selfish. Estranged spouses may make gifts to each other,[14] and affianced persons may haggle and bargain coldly.[15] Thus, as the

[14] As a matter of fact the instant record reveals that taxpayer gave her husband, in the course of the three preceding years, more than $150,000 in cash (R. 5), on account of which the Tax Court and the court below held with the Commissioner that gift taxes were due (R. 6–9, 24–28).

[15] The implication contained in taxpayer's brief (p. 31) that the parties had been engaged in ordinary business transactions between themselves involving various items of property, which were settled by the agreement, is without basis in the record. No such issue was presented to the Tax Court. Indeed, the Tax Court based its decision solely on the authority of the *Barnard* case, involving an erroneous conception of the controlling legal criteria, and did not purport to view the case as one involving a settlement of a dispute between the parties as to specific properties employed in carrying on ordinary business transactions. There is no showing that the pleadings in the Nevada suit or that the divorce decree involved decision of any such issue.

Wemyss, Merrill, and *Bristol* cases illustrate, the circumstance that a bargain may have been struck by the parties is not enough to transform it into a commercial transaction entered into in the normal course of business. Evidence of bitterness of feeling, if such there be, tends to support the Commissioner's contention, for business transactions do not ordinarily involve such emotional aspects. In any event, since, for the purposes of the gift tax, Congress dispensed with the test of donative intent (see pp. 14–15, *supra*), whether or not generosity was a motivating force is as immaterial in the context of a postnuptial agreement as in that of an antenuptial agreement.

In its *Barnard* opinion (9 T. C. 61) the Tax Court relied upon the decision of the Seventh Circuit in *Lasker* v. *Commissioner,* 138 F. 2d 989. That case, however, was decided in 1943, prior to this Court's decisions in the *Wemyss* and *Merrill* cases, and its reasoning, particularly its assumption that donative intent is essential for a gift, was overruled by the holding in those cases.[16] In any event the *Lasker* case may be distinguished on the ground that the court there understood the

[16] See criticism of the *Lasker* case in Paul's Federal Estate and Gift Taxation, *supra* (1946 Supp.), 711–12. The *Lasker* case expressly disapproved the *Bristol* case (p. 992) and approved the District Court's opinion in the *Merrill* case (51 F. Supp. 120) (S. D. Fla.). On the other hand, this Court approved the *Bristol* case in its *Wemyss* (p. 307) and *Merrill* (p. 313) opinions, and affirmed the reversal of the District Court in the *Merrill* case.

Commissioner to concede that the particular transfer in question was made in the ordinary course of business within the meaning of Regulations 79, Article 8, *supra* (p. 20), and appears to have founded its holding on that premise (p. 991).

The other cases cited by the Tax Court in its *Barnard* opinion (9 T. C. 61, 67) formed part of the "series of decisions" in which the Tax Court had developed and applied "this distinction without a difference" between antenuptial and postnuptial transfers (176 F. 2d 233, 235). The reasoning in all of these Tax Court cases represents, we submit, a clear departure in principle from the correct construction of the statute and Regulations and cannot be reconciled with the *Wemyss* and *Merrill* decisions. In each instance donative intent and arm's length character of the transfer are erroneously treated as decisive tests.[17]

The leading case generally cited in the subsequent Tax Court decisions is *Jones* v. *Commissioner*, 1 T. C. 1207, *supra*,[18] decided *en banc* in

[17] While the reasoning of these Tax Court cases is questioned, however, in many of them, as noted in Subpoint B below (p. 39), the Commissioner does not disagree with the result reached, since they involve solely release by a wife to a husband of support rights which, in accordance with his Ruling E. T. 19, 1946-2 Cum. Bull. 166, 168–169 (Appendix, *infra*, pp. 64–67), also discussed in Subpoint B below, the Commissioner now regards as constituting adequate and full consideration in money or money's worth.

[18] In the *Lasker* case, *supra*, the Court of Appeals also cited the *Jones* case with approval (pp. 991–992).

1943, prior to the *Wemyss* and *Merrill* cases. In its opinion in the *Jones* case the Tax Court noted that this was the first instance of a transfer incident to marital dispute to come before it (as contrasted with antenuptial transfers) (p. 1209), and in that connection said (p. 1210):

> Moreover in those cases [antenuptial] the circumstances are frequently such that there may well be a definite donative intent in the transfer. The contract there may be to effect a mere family arrangement. The parties are manifestly not dealing at arm's length and the purpose to exact a *quid pro quo* may be lacking.

Further, the Tax Court held, so far as pertinent here, as follows (p. 1212):

> * * * we think the present transfer was not within the purview of section 503, *supra*. That section can scarcely mean that all arm's length business transactions, involving transfers of property, shall be subjected to scrutiny and, in every case where one party makes a bad bargain, he should have his misfortune increased by the imposition of a gift tax on his unfavorable balance from the transaction. The tax is imposed by authority of section 501. It is expressly limited to transfers "by gift." "Gift" is not defined in the statute. The respondent, however, has himself defined the term as used in the controlling statute as excluding arm's length business transactions, such as is evident here, in which

> there was no donative intent. Regulations 79, arts. 1, 2, and 8, approved October 30, 1933, and arts. 1, 2, and 8 of the same regulations, approved February 26, 1936. * * * We think that is correct.

This construction of the statute and Regulations plainly conflicts with that enunciated in *Commissioner* v. *Wemyss,* 324 U. S. 303, and *Merrill* v. *Fahs,* 324 U. S. 308, and was properly regarded by the court below in its *Barnard* opinion as overruled by this Court. Nevertheless, the Tax Court, though not without dissent, continued after these Supreme Court decisions to follow the *Jones* case. *Converse* v. *Commissioner,* 5 T. C. 1014 (affirmed by the court below, 163 F. 2d 131, on another ground, discussed, *infra,* pp. 52–53), decided *en banc* in 1945, was the first such case to arise. There the Tax Court without discussion simply distinguished the *Wemyss* and *Merrill* decisions factually, as involving antenuptial agreements, saying (p. 1016):

> The two Supreme Court cases just mentioned, as well as the *Bristol* case, all dealt with antenuptial agreements. The Supreme Court did not deal with the question which was in the *Jones* case and did not indicate its views on that question. We follow the *Jones* case * * *.

Three judges dissented for the reason stated by Judge Arnold in his dissenting opinion, as follows (p. 1016):

> I think the majority errs in following *Herbert Jones,* 1 T. C. 1207. The doctrine of that case has, in my opinion, been repudiated by the Supreme Court in *Commissioner* v. *Wemyss,* 324 U. S. 303, and *Merrill* v. *Fahs,* 324 U. S. 308, and *no basis for a distinction between antenuptial and postnuptial transfers now exists.* [Italics supplied.]

In *Lahti* v. *Commissioner,* 6 T. C. 7 (January 8, 1946), the *Jones* and *Converse* cases were again followed in a decision *en banc* without discussion, it being considered decisive, erroneously we contend, that the transactions between the husband and wife were "at arm's length between two contracting parties with adverse interests" (p. 9) and were without any donative intent. The dissenting judges in the *Converse* case again noted dissent on the ground that the *Jones* doctrine had been repudiated by this Court.

In *Mitchell* v. *Commissioner,* 6 T. C. 159, 165, decided January 31, 1946, the *Merrill* and *Wemyss* cases were again distinguished without discussion on the authority of the *Jones* and *Converse* cases.

The *Barnard* case followed next in time (July 1947) and, as seen, was decided "upon the au-

thority" (9 T. C., *supra*, p. 67) of the *Lasker* case and the four Tax Court cases above cited.

In *Hooker* v. *Commissioner*, 10 T. C. 388, decided *en banc* February 26, 1948, the Tax Court further elucidated its reasoning in distinguishing between antenuptial and postnuptial transfers. There the transfer was to a child upon a separation agreement, and was held to be a gift to the extent it exceeded the father's obligation to support the child. The Tax Court explained (pp. 392–393):

> We are unable to agree with the petitioner that this case is like *Herbert Jones*, 1 T. C. 1207, and similar cases (including the lump sum in the *Converse* case) in which it was held that transfers to a wife pursuant to a separation agreement or a divorce decree were not gifts. *The reason for holding in those cases that there was no gift was that the circumstances negatived the presence of a donative intent and showed an arm's length transaction. But the absence of a donative intent and the presence of adequate consideration in money or money's worth may not be presumed in prenuptial agreements* and in transfers for the benefit of minor children. * * * Nor is it sufficient that provisions for the minor children were incorporated in the separation agreement and the divorce decree, since the fact that

> the husband may have bargained closely with his wife does not negative a donative intent in so far as the agreement provided for the children. *Edmund C. Converse, supra.* [Italics supplied.]

Thus, in the *Hooker* case the Tax Court once more demonstrated that in differentiating between antenuptial and postnuptial transfers it applied erroneous criteria, namely, donative intent and arm's length transaction, and failed to apply the proper test, namely, whether the transaction was one in the ordinary course of business. On taxpayer's appeal the Court of Appeals for the Fifth Circuit affirmed (174 F. 2d 863), but clearly rejected the Tax Court's reasoning distinguishing postnuptial agreements. Citing the *Merrill* case, the court said (p. 866):

> The surrender by Mrs. Hooker of her possible dower or other marital rights in Mr. Hooker's estate cannot be considered in this connection a full and adequate consideration in money or money's worth.

The Tax Court also decided *en banc,* on the same day as the *Hooker* case, *Moore* v. *Commissioner,* 10 T. C. 393, following the *Jones* case and distinguishing the *Wemyss* and *Merrill* cases without discussion.

The instant case followed two months later (R. 3), and as has been stated (p. 13, *supra*),

was decided without discussion solely on the authority of the *Barnard* case.

In *Beveridge* v. *Commissioner,* 10 T. C. 915, decided *en banc* May 24, 1948, a transfer from a mother to a daughter in settlement of a dispute between them was involved. While the decision in the *Beveridge* case is supportable on several grounds, *inter alia,* that the transfer there was made for adequate consideration, so far as here pertinent, the Tax Court said, citing *Barnard* and the other cases above discussed (p. 918):

> The transfer made is analogous for tax purposes to those of spouses who agree upon a property settlement prior to divorce in order to satisfy existing claims of one against the other. Transfers pursuant to such agreements are not gifts and are not subject to gift tax * * *.

Thus, the Tax Court again asserted a general rule that transfers upon property settlements prior to divorce are not subject to gift tax.

McLean v. *Commissioner,* 11 T. C. 543, decided October 6, 1948 (appeal by the Commissioner pending in the court below); *Taurog* v. *Commissioner,* 11 T. C. 1016, decided December 14, 1948; and *Harding* v. *Commissioner,* 11 T. C. 1051 decided December 22, 1948 (all *en banc*), also followed the line of cases led by *Jones* v. *Commissioner,* 1 T. C. 1207, but were notable for vigorous

dissents by Judge Disney[19] (joined by Judge Turner in the *McLean* case).

In her brief here (p. 23) taxpayer refers to the Tax Court's—

> broad all-inclusive holding in the *Barnard* case, following its other holdings, that in a

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[19] These dissents were regarded by the court below in the *Barnard* case "as stating the necessary and correct principles after *Merrill* v. *Fahs*, *supra*" (176 F. 2d 223, 235–236), quoted, *supra*, at p. 13. Thus, in his dissent in the *Harding* case, Judge Disney stated (p. 1057):

"In my opinion, adherence to views expressed in *Herbert Jones*, 1 T. C. 1207, prior to *Merrill* v. *Fahs*, 324 U. S. 308, and *Commissioner* v. *Wemyss*, 324 U. S. 303, and in cases following the *Jones* case, is wholly unwarranted since the promulgation of the views of the Supreme Court."

Again, in his dissent in the *Taurog* case, Judge Disney said (pp. 1025–1026):

"* * * I am completely unable to discern a difference between agreements between spouses-to-be in the *Wemyss* and *Merrill* v. *Fahs* cases, and between spouses in this case [contemplating divorce]. All are equally at arm's length. Though as stated in my dissent in *Edward B. McLean*, 11 T. C. 543, sweethearts may, romantically speaking, be thought not to deal 'at arm's length', in any realistic business sense the transfers between them in the *Wemyss* and *Merrill* v. *Fahs* cases were not only just at arm's length as the transfer here involved or involved in the cases relied upon by the majority, but it is clear that such prenuptial arrangements were precisely the antithesis of gifts in the ordinary sense. Sweethearts wishing to make gifts do not coldly require *quid pro quo*, such as property or release of marital rights, as in those cases required. Yet the Supreme Court held that, despite lack of ordinary donative intent, under Federal law they were gifts. Therefore, similar contractual arrangements between husband and wife cannot logically be differently classed, merely because of some idea of 'arm's length' plainly equally present in the transactions in the cases last named."

> postnuptial settlement at arm's length, a relinquishment of marital rights is an adequate and full consideration in money or money's worth

and further describes this holding as laying down a general rule of statutory construction as follows (p. 24):

> The Tax Court has accordingly held that in providing in Section 812 b * * * that a relinquishment of dower, curtesy or other marital rights shall not be considered to any extent a consideration in money or money's worth, Congress intended to forestall only such transfers either prior to or during marriage when no divorce is contemplated, and when the parties might not be dealing at arm's length but consummating an amicable family arrangement to avoid taxes. * * *

In summary, the Tax Court in a consistent line of cases, before and after the *Wemyss* and *Merrill* decisions by this Court, has applied, as a rule of law, a purported distinction which would except from the gift tax postnuptial transfers involving relinquishment of marital rights. But the gift tax provisions, in support of the estate tax, typically comprehend family settlements made either before, during, or, as here, upon the break-up of a marriage, involving transfers between spouses. Consonant with the erroneous view which its majority has repeatedly expressed, the Tax Court failed to apply to the instant facts

the test prescribed by the Regulations and approved by this Court, namely, whether the transfer was made in the ordinary course of business.

To taxpayer's apparent suggestion (Br. 37–39) that the instant record warrants the finding as a fact of a commercial transaction made in the ordinary course of business, the response afforded by the court below in its *Barnard* opinion to a similar suggestion is equally apt here (p. 235):

> We regard the suggestion that the one case [antenuptial settlement] shows more of a business transaction than the other [separation agreement] as bordering upon the fanciful; a transfer as part of a separation agreement ending a marriage in ordinary contemplation is no more for a business purpose than a transfer to induce a marriage.

Within the meaning of ordinary speech, the instant facts cannot be characterized as a commercial transaction in the ordinary course of business.[20] The Tax Court made no such finding,

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[20] In this connection, summarizing the cited line of Tax Court cases and referring to Section 86.8 of the Regulations, in an annotation entitled Consideration as Affecting Liability For Gift Tax, 174 A. L. R. 203, 206 (1948), it was well said, prior to the Court of Appeals decisions in the *Barnard*, *Hooker*, and the instant case, as follows:

"* * * The courts, while purporting to follow this regulation, seem to apply it in case [*sic*] where an agreement is made at arm's length but there is no conceivable resemblance to a transaction in the ordinary course of business."

and if it had, it would have been clearly erroneous.[21]

B. *Taxpayer did not receive "adequate and full consideration in money or money's worth" for the excess amount transferred.*—Since, as discussed in subpoint A, *supra,* pp. 12–25, the transfer here was a "gift" within the meaning of the controlling statute (Section 1000), it is taxable to the extent that taxpayer failed to receive for it "adequate and full consideration in money or money's worth" (Section 1002). The basic purpose for the statutory requirement of adequate and full consideration in money or money's worth, as already stated, *supra,* pp. 18–21, is to prevent the gratuitous depletion of the transferor's estate, without a tax roughly equivalent to the estate tax being paid on the transfer. *Commissioner* v. *Wemyss,* 324 U. S. 303, 307–308; *Merrill* v. *Fahs,* 324 U. S. 308, 311–313; *Commissioner* v. *Bristol,* 121 F. 2d 129, 133–134. The legislative history of the gift tax plainly shows that its major purpose is to serve as a bulwark

[21] Since petition for review to the Court of Appeals was not filed here until after the effective date of the amendment to Section 1141 (a) of the Internal Revenue Code, *Dobson* v. *Commissioner,* 320 U. S. 489, rehearing denied, 321 U. S. 231, has no instant application. (See taxpayer's Br. 39.) Compare *Wright-Bernet* v. *Commissioner,* 172 F. 2d 343, 345 (C. A. 6th).

to the estate tax, and also to supplement the income tax."[22]

The Regulations provide that where "a consideration" is "not reducible to a money value" it is "to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift." Section 86.8. Thus, on this aspect of the case the question is, what, if any, consideration reducible to a money value did taxpayer receive for the excess amount

[22] Thus, the committee reports for the Revenue Act of 1932, which recommended enactment of the gift tax, explained (H. Rep. No. 708, 72d Cong., 1st Sess., pp. 8, 28 (1939–1 Cum. Bull. (Part 2) 457, 462, 477)):

"* * * To assist in the collection of the income and estate taxes, and prevent their avoidance through the splitting up of estates during the lifetime of a taxpayer, your committee recommends a gift tax with a maximum rate of 30 percent. * * *

* * * * * *

"* * * In short, the design is to impose a tax which measurably approaches the estate tax which would have been payable on the donor's death had the gifts not been made and the property given had constituted his estate at his death. The tax will reach gifts not reached, for one reason or another, by the estate tax.

"The gift tax will supplement both the estate tax and the income tax. It will tend to reduce the incentive to make gifts in order that distribution of future income from the donated property may be to a number of persons with the result that the taxes imposed by the higher brackets of the income tax law are avoided. It will also tend to discourage transfers for the purpose of avoiding the estate tax."

The Senate Committee Report is substantially identical. S. Rep. No. 665, 72d Cong., 1st Sess., pp. 41, 40 (1939–1 Cum. Bull. (Part 2) 496, 504, 525).

which she gave her husband over what he gave her? Congress has prescribed that where a gift is made in property the value of the property at date of the gift constitutes the amount of the gift. (Internal Revenue Code, Section 1005, Treasury Regulations 108, Section 86.17, Appendix, *infra*, pp. 62, 63.) Here the Commissioner and the Tax Court fixed the excess value of the property transferred to the husband to amount to $107,150.78[23] (R. 6, 29), and for this excess amount, taxpayer failed to show receipt of any consideration recognizable under the gift tax.

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[23] This amount of the gift was not disputed in the court below (R. 29), excepting for $41,291.88 fixed by the Commissioner as the commuted actuarial value of the husband's annuity in the amount of $50,000, payable in monthly instalments for ten years (R. 6, 29). Taxpayer's contention that this undertaking (Agreement, par. 3, R. 13) consisted of a series of independent monthly gifts, not to be appraised as one at the time when the agreement went into effect, was overruled by the court below (R. 31) and is not in issue here. Indeed, in the Tax Court, taxpayer offered no proof contesting the valuation determined by the Commissioner of the excess amount transferred to her husband, and, in fact, stipulated that no question as to the amount of the gift was in the case, but only whether the transfer was subject to the gift tax. (Typewritten Tr. 75, 82, 255–257.) An incidental adjustment as to what effect, if any, the fourth paragraph of the agreement (regulating income tax incidence on the annuity payments as between taxpayer and her husband (R. 13–14)) had on the amount of the gift tax, was on stipulation in the Tax Court left open for computation under its Rule 50 (R. 31–32, Typewritten Tr. 81–82).

Again, the instant record is distinguishable from many of the Tax Court cases cited *supra* where the transfer was made in part or in whole by husband to wife in consideration of the release of his obligation to support her.[24] The Commissioner holds such transfers by a husband in release of *support* rights to constitute adequate and full consideration reducible to a money value.[25] On the other hand, the Commissioner, in the same ruling (Appendix, *infra*, pp. 65–66), holds that a transfer to a wife, incident to divorce or separation, in settlement of the relinquishment by her of her marital rights in the husband's *property* or estate falls squarely within the statute and its construction in *Merrill* v. *Fahs, supra,*

[24] See, for example, Rudick, *Marriage, Divorce and Taxes*, 2 Tax L. Rev. 123, 161, 162 (1947), referring to the *Converse*, *Lahti* and *Mitchell* cases, as follows:

"* * * In some of the later cases there are statements about the absence of donative intent and the arm's length character of the settlement which do not reconcile easily with the opinions of the Supreme Court in the *Merrill* and *Wemyss* cases, but each of the cases may be supported on the ground that what was transferred represented compensation merely for the surrender of support rights. * * *

* * * * *

"* * * On the other hand, where the transfer is by the wife, who owes no duty of support to her husband, the entire amount should be taxable."

[25] E. T. 19 (Appendix, *infra*, pp. 64–67), issued in August 1946, where the view was expressed that surrender of support rights is not one of the "other marital rights" referred to in Section 812 (b) quoted in the succeeding footnote 26.

pp. 311–313 (see also Internal Revenue Code, Section 812 (b), Appendix, *infra*, p. 61, quoted in footnote)[26] and cannot constitute to any extent adequate and full consideration in money or money's worth under Section 1002.

Here, as in *Estate of Barnard* v. *Commissioner*, 9 T. C. 61, reversed, 176 F. 2d 233 (C. A. 2d), the disputed transfer was made by the wife to the husband. Hence, consideration for release of support rights cannot validly be suggested in any jurisdiction involved.[27] By the agreement each party released and relinquished all rights that he or she might have or thereafter acquire (par. 10, R. 16) "to share in any capacity whatsoever in the estate of the other party upon the latter's death," and also mutually released each other as to all present or future claims and obligations, except as expressly otherwise provided (pars. 1, 2, 11; R. 12, 13, 16–17, 28–29). Taxpayer's

[26] "For the purposes of this subchapter, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth.'"

[27] For example, concededly there was no community property and the parties never resided as husband and wife in Nevada and he never was a resident of Nevada (Pet. Br. 30). His estate was substantial (R. 5). Under Nevada statute the wife is obliged to support the husband out of separate property only when he has no separate property and from infirmity is not able to support himself. 2 Nevada Compiled Laws (1929), Section 3378.

claim that she placed no reliance on the quoted provision as consideration, since the settlement was entered into in contemplation of divorce and, upon divorce, the husband would, allegedly, in any event, be excluded from any share in her estate (Br. 27–28) does not help her case. This claim, if valid, would simply mean that she received *no* consideration for the transfer. But in any event, such relinquishment of marital property rights as is here involved is essentially no different from that in the *Merrill* and *Barnard* cases. The agreement states that it was executed for the purpose of effecting a settlement of the respective property rights of the parties and of removing their subject matter from the field of litigation (R. 11), and its "covenants" should survive any divorce decree that might be entered (R. 18). Clearly, there is no consideration in money's worth where property is transferred by wife to husband, because the husband wants to be reimbursed for the loss of his marital interest in the wife's estate which would result from the divorce. Here, her transfer to the husband was obviously made, in part, in return for release of his marital rights in her million dollar estate upon her death. Promise of marriage does not constitute consideration "reducible to a money value" (Section 86.8, Treasury Regulations 108); by the same token, there is no consideration in dollars

and cents where a property settlement is induced by the wife's desire to obtain her husband's acquiescence to a divorce.[28]

At the time of the instant agreement in 1943 the parties could not be certain that the Nevada divorce would effectively bar his marital interest in her large estate in all jurisdictions. Without his assent personally to appear in the Nevada suit, the Nevada court could not affect any property rights of the husband in her New York and British estates. Taxpayer states that subsequent to the divorce both parties became residents of New York, the husband still remaining a British subject and subsequently dying in New York, a British subject (Br. 27), and suggests that in enforcing the transfers outside of Nevada recourse might be had to the agreement rather than to the Nevada decree (Br. 62). Be that as it may, the court below (R. 29), following *Merrill* v. *Fahs*, 324 U. S. 308, was clearly correct in holding as a matter of law under the gift tax, that these promises did not constitute adequate and full consideration in money or money's worth.[29]

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[28] See Kaplan, *Are Transfers of Property Pursuant to Separation Agreements Gifts?*, 5 Tax L. Rev. 90, 95–96 (1949).

[29] *Commissioner* v. *Mesta*, 123 F. 2d 986 (C. A. 3d) certiorari denied, 316 U. S. 695, cited by taxpayer (Br. 34), is not in point, since there the income tax and not the gift tax was involved and the issue was whether gain realized by taxpayer under an agreement with his wife was correctly measured by the fair market value of stock which he had transferred to her.

In conclusion, the reasoning of the court below in its *Barnard* opinion is equally applicable here (p. 235):

> The executor argues that the *Merrill* case can be distinguished because the transaction involved there was an antenuptial settlement, rather than a separation agreement. But the amount that Mrs. Merrill would have received at Merrill's death would have been taxed to his estate before she received it, just as the amount that Barnard would have received at Mrs. Barnard's death by marital right would have been taxed to the estate before he received it. That is, the gap in the revenue laws which the gift tax was designed to fill is just as apparent in the one situation as the other; and if the two taxes are to be construed harmoniously in the one case, they certainly should be in the other.

C. *The transfer was founded upon and in satisfaction of obligations voluntarily assumed by the parties in their property settlement agreement.*— It cannot successfully be contended that no gift tax is due here because the transfer was made involuntarily, pursuant to obligations imposed on the taxpayer by a court decree.

Congress intended to use the terms "transfer" and "indirectly" (as well as "gift") in "the broadest and most comprehensive sense." H. Rep. No. 708, 72d Cong., 1st Sess., *supra*, p. 27 (1939–1 Cum. Bull. (Part 2) 457, 476); S. Rep.

No. 665, 72d Cong., 1st Sess., *supra*, p. 39 (1939–1 Cum. Bull. (Part 2) 496, 524). The statute imposes the tax upon "transfer * * * by gift" (Section 1000 (a), Internal Revenue Code), and Section 1000 (b) (Appendix, *infra*, p. 61) reads:

> (b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *.

The controlling Treasury Regulations (already quoted, in another connection, *supra*, p. 17), correctly mark out the statutory meaning as follows (Section 86.2):

> Inasmuch as the tax also applies to gifts indirectly made, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax.[30]

An analysis of the obligations created by the instant agreement and of the terms of the state court judgment establishes that the disputed transfer, directly or indirectly and regardless of the means or device employed, was founded upon and in performance and satisfaction of the property settlement agreement voluntarily entered into by the parties. The agreement was made February

[30] This language derives from the same committee reports. H. Rep. No. 708, *supra*, pp. 27–28; S. Rep. No. 665, *supra*, p. 39 (1939–1 Cum. Bull. (Part 2) pp. 476, 524).

27, 1943 (R. 19), and the judgment entered one week later, on March 6, 1943 (R. 23). In the language of the Tax Court and of the court below, the Nevada state court merely "adopted" (R. 9, 25) the agreement of the parties. The terms of these documents establish that, although formally submitted to the court for approval, whether approved or not the promised transfers were to be performed despite any provisions of the divorce decree that the court might make. The agreement explicitly was (R. 11)—

> made for the purpose of settling the respective property rights of the parties hereto and of removing the subject matter thereof from the field of litigation.

Even more plainly than the quoted recital, the "covenants" of the agreement illuminated this purpose of removing the subject matter of mutual property transfers from the purview of the divorce court, as follows (par. 17, R. 18)—

> this agreement is executed for the purpose of effecting a settlement of the respective property rights of the parties hereto in the event a divorce should be decreed. This agreement shall be submitted to the court for its approval, but nevertheless the covenants in this agreement shall survive any decree of divorce which may be entered.

Thus, the agreement created the ultimate obligation, and while submitted to the court for approval, "nevertheless the covenants in this agree-

ment *shall survive any decree* of divorce which may be entered" (italics supplied). Performance of the property transfer, and the persistence of its obligation, were thus guaranteed, irrespective of the particular provisions made by the court in the divorce decree.

Moreover, the contract, further implementing the provisions for survival of its obligation after the decree, stated (R. 18)—

> The settlement herein provided shall become immediately effective and operative in the event of and upon the entry of a decree of divorce between said parties in said pending Nevada action.

Hence, performance of the transfer promised under the agreement became immediately binding upon taxpayer—once the divorce decree was entered—and no matter what terms the judgment might contain.

Similarly, the judgment itself explicitly kept the contractual obligations in effect (R. 23)—

> Notwithstanding the approval of said agreement and the trust agreements forming a part thereof by the Court herein, It is ordered that said agreement and said trust agreements forming a part thereof shall survive this decree.

Thus, the express provisions of the decree refute any contention that the agreement was swallowed by the decree. Consistently, the state court divested "itself of all power to amend or modify

the same [decree] in the future without the consent of both of the parties hereto" (R. 23). The conclusiveness of this provision under Nevada law seems clear. *Helvering* v. *Fuller*, 310 U. S. 69, 73, 75.

Again, while by its terms the agreement was to become binding only when and if a divorce decree was entered in the pending action (par. 17, R. 18), this provision constituted merely a condition precedent to its inception, and, as already seen, once the divorce was granted—no matter what its terms—the judgment could not affect or impair taxpayer's contract obligations. In fact, the divorce was entered, taxpayer's pledge thereupon became "immediately effective and operative," and the disputed transfer was made in performing it.[31]

[31] By express provision of statute, public policy in Nevada does not prohibit provisions such as are above discussed. See Nevada Compiled Laws (1929), Section 3374 (as amended by Laws of Nevada (1935), c. 89, p. 194):

"*Contract of separation—Agreement not affected, when.* § 20. A husband and wife cannot by any contract with each other alter their legal relations except as to property, and except that they may agree to an immediate separation, and may make provision for the support of either of them and of their children during such separation. In the event that a suit of divorce is pending or immediately contemplated by one of the spouses against the other, the validity of such agreement shall not be affected by a provision therein that the agreement is made for the purpose of removing the subject matter thereof from the field of litigation, and that in the event of a divorce being granted to either party, the agreement shall become effective and not otherwise."

Further evidencing that this contract was not looked upon by the parties as a temporary expedient, or a suggested compromise conditioned upon and ending with the entry of a divorce decree, is the provision that the agreement was binding upon and inured to the benefit of their heirs, executors, administrators and assigns (Par. 18, R. 18). Indeed, in the event of the death of the husband, the monthly payments of $416.66 for the ten year period were nevertheless to continue and be made to his personal representatives or assigns (Par. 3, R. 13).[22]

Many other specific promises in the agreement confirm its independence of the decree and the parties' understanding that they were obligatory, no matter what its terms. Thus, the agreement read (R. 18):

> The parties hereto, however, shall proceed as expeditiously as possible to carry into effect the covenants herein, which it is provided are to be performed by either of the parties *prior to the entry of the decree* as aforesaid. [Italics supplied.]

Thus, many promises were to be performed before the parties supposedly ever could know as to what property settlement the divorce decree might contain. Included among such covenants were the following: taxpayer's monthly payments

[22] In fact, the husband is no longer living (Pet. Br. 27).

of $416.66 to her husband were to commence on March 1, 1943 (two days after the date of the agreement), and to continue for a period of ten years (Par. 3, R. 13). Taxpayer consented to the sale "immediately" of her husband's stocks valued at approximately $28,000, held as security by the National City Bank, that from the proceeds he be paid the sum of $25,000, and the balance be applied *inter alia* to the payment of such taxes on certain real property as might be due up to March 1, 1943 (Par. 6, R. 14–15). Taxpayer "hereby" assumed the indebtedness of her husband in excess of $47,650, under certain promissory notes, and agreed to cause the bank to return the notes to him "within ten days from the date hereof" (Par. 7, R. 15). Specific articles of personal property set forth in the schedule attached to the agreement (R. 19), declared to be taxpayer's property, were to be delivered to her by her husband "within ten days' (Par. 9, R. 16). These absolute obligations provide further proof that the promises to make transfers under this contract were not the subject matter of litigation at all nor founded upon a judgment.

Another significant undertaking shows that the parties understood that transfers would be made by taxpayer under the agreement, in performance of "covenants assumed" in the agreement, and that such transfers might result in gift taxes, for

which taxpayer assumed responsibility. Thus, it was stipulated (Par. 13, R. 17):

> The Wife shall be responsible for and shall make payment of * * * any gift taxes which may be due or payable by reason of any transfers pursuant to the terms of this agreement, or any gift taxes that may become due or payable in the future on any transfers which the Wife will make in the future pursuant to the covenants assumed by the Wife in this agreement.

Indeed, in its decision the Nevada court found that under the terms of the agreement "the parties settled all obligations arising out of their marriage" (R. 21). However, the state court further found that the payments to be made by taxpayer to her husband as set forth in paragraphs 3 and 8 of the agreement "are in discharge of a legal obligation which, because of the marital relationship has been imposed upon the plaintiff" (R. 21). The court concluded that the agreement was entitled to approval and, accordingly, in its judgment decreed such approval and ordered that taxpayer pay to her husband the payments provided for in paragraphs 3 and 8 of the agreement (R. 23). This provision had the effect merely of affording the husband additional remedies for enforcement of these paragraphs 3 and 8, as by contempt proceedings, adding such sanctions to those available under the contract. The obligations of the agreement remained unimpaired, and

were enforceable like other contracts; as already stated, by the terms both of agreement (R. 18) and judgment (R. 23), they expressly survived. They subsisted and it is undeniable that the disputed transfer was founded upon them. That it may in part also have been founded upon the judgment (as suggested in the opinion below, R. 31) is irrelevant; Congress nowhere excepted transfers merely because they are founded in a decree.[33]

Even without express provision the contractual obligation is held to survive such a judgment (*Goldman* v. *Goldman,* 282 N. Y. 296, 300, 305; *Freeman* v. *Sieve,* 323 Mass. 652, 655–657); *a fortiori,* where as here both the judgment and the agreement explicitly provide for such survival. See *Welch* v. *Chapman,* 296 Mass. 487, where the court said (p. 488):

> Merely reading the agreement and the decree makes plain that the agreement was not to expire when its terms should be embodied in a decree of divorce, and that the decree was not intended as a substitute

[33] Indeed, the judgment directed performance of only two paragraphs of the agreement. (Par. 3, annuity to husband, R. 13; and par. 8, transfer of trust remainder, R. 15.) Other obligations of the contract, such as taxpayer's assumption of the husband's indebtedness in the amount of $47,650 (par. 7, R. 15), and the transfers from the husband to her (pars. 5 and 6, R. 14–15), and numerous other provisions of the contract, were not covered.

> for the agreement. There is no reason why the wife may not have the protection of both. Cases where the agreement was intended to provide only for a period of separation without change in the legal relationship, are not in point.

Accordingly, the instant case is plainly differentiated from the state of facts which existed in *Commissioner* v. *Converse,* 163 F. 2d 131 (C. A. 2d), for clearly here the transfer was not founded upon the command of the state court judgment but upon the agreement of the parties, independent of the judgment, surviving it, and not merged into it, the court expressly negating its power to amend the judgment except with the parties' consent. *Commissioner* v. *Barnard's Estate,* 176 F. 2d 233, 236, *supra; Krause* v. *Yoke,* 89 F. Supp. 91, 96–98 (N. D. W. Va), (appeal pending to the Court of Appeals for the Fourth Circuit). In the *Barnard* case (p. 236), the court below noted that "the *Converse* opinion has been cited beyond its scope in some of the decisions below". It was also distinguished here (R. 30).

The essence of the holding in the *Converse* case was that (p. 133):

> The monetary provisions of the original postnuptial agreement for monthly payments to the wife were not carried out.

Although a subsequent agreement made during the divorce trial no doubt was a factor in influ-

encing the Nevada court to enter the judgment requiring the payment there directed (p. 133)—

> Yet that was but one of the factors, the others being the evidence introduced and considered by that court in reaching its decision as to the amount of the money judgment.

Thus, in *Converse* the original postnuptial agreement had provided for the payment by the husband of $1,250 per month during the wife's life, but at the trial in the state court the issue of its fairness was litigated, the husband alleging that a single payment would be for the best interests of the parties. This was the issue tried out, resulting in a judgment directing a lump sum payment of $625,000. The payment of this lump sum decreed by the state judgment was the transfer which the Commissioner there sought to tax. Hence, in the *Converse* case, the obligation to make the transfer was in issue in the state litigation and was settled by that litigation; it was founded upon the judgment and not upon the contract at all, for the contract was never carried out, and as stated by the court below in the *Barnard* case (p. 236):

> * * * in the *Converse* situation the divorce court had decreed a lump sum payment, in lieu of monthly payments provided by the separation agreement; and the decree created of its own force a judgment debt owed by the taxpayer.

On the other hand, the instant record is in striking contrast with the *Converse* situation. Here the agreement was carried out and the disputed transfer, instead of being the creature of the state court litigation and judgment, was by the agreement explicitly removed "from the field of litigation" (R. 11).

The estate tax cases, such as *Commissioner* v. *State Street T. Co.*, 128 F. 2d 618 (C. A. 1st); *Yoke* v. *Fleming*, 145 F. 2d 472 (C. A. 4th); *Commissioner* v. *Swink*, 155 F. 2d 723 (C. A. 4th); and *Commissioner* v. *Maresi*, 156 F. 2d 929 (C. A. 2d), are all distinguishable. As stated by the court below with respect to its *Maresi* decision, such cases stand (R. 30)—

> for no more than that, when the validity of the settlement is made conditional upon its adoption by the decree, and when it does not by its terms survive the decree, the payments are not "founded" upon the "promise or agreement."

In *Commissioner* v. *State Street T. Co., supra*, p. 620, for example, while there was some evidence that the parties reached an agreement prior to the decree, the record did not show clearly what the agreement was and, in any event, it was regarded as superseded by the decree (p. 621). *Yoke* v. *Fleming, supra*, was expressly affirmed by the Court of Appeals for reasons which had been given in the opinion of the District Court, 53 F.

Supp. 552 (N. D. W. Va.). Nevertheless, in *Krause* v. *Yoke*, 89 F. Supp. 91 (N. D. W. Va.), a gift tax case, on reasoning analogous to that adopted here by the court below, the same District Judge distinguished the *Fleming*, *Swink* and *State Street T. Co.* cases, *supra*, and sustained the tax on the ground that the record in the *Krause* case established that the transfer there (as here) was founded upon the parties' agreement and not upon the divorce decree. The cited cases are typical of the situation where the parties' agreement is no more than a suggested compromise, which the divorce court may or may not choose to accept as the measure of their obligations and which becomes an obligation only if the decree so provides.

D. *Alternatively, the transfer is taxable, even though the obligations of the property settlement agreement are not regarded as having survived the judgment.*—In the event the Court should not agree with the argument made in the preceding Subpoint C and should consider that the obligations of the agreement failed to survive the judgment, we submit nevertheless that the tax is due. It seems doubtful that the cited estate tax cases, such as *Commissioner* v. *State Street T. Co.*, 128 F. 2d 618 (C. A. 1st); *Yoke* v. *Fleming*, 145 F. 2d 472 (C. A. 4th); *Commissioner* v. *Swink*, 155 F. 2d 723 (C. A. 4th); and *Commissioner* v. *Maresi*, 156 F. 2d 929 (C. A. 2d), were correctly decided,

even though their holdings are limited in the manner indicated by the court below (R. 29–30). Thus a commentator (1 Paul, Federal Estate and Gift Taxation, Sec. 11.24 (p. 610)), has written:

> The mere formal incorporation of the separation agreement in the divorce decree is a frail distinction on which to base deductibility of the claim.[34]

Indeed, the *State Street T. Co.* case, *supra,* p. 621, and the *Maresi* case, *supra,* p. 931, admit the seeming incongruity and formality of such a distinction.

These estate tax cases rest heavily upon language peculiar to the estate tax (Section 812 (b) (4) Internal Revenue Code, Appendix, *infra,* pp. 60–61), limiting the requirement of adequate and full consideration in money or money's worth to claims "founded upon a promise or agreement" (Section 812 (b)).[35] The circumstance

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[34] See, also, statement by the Tax Court in *Hooker* v. *Commissioner*, 10 T. C. 388, 391–392; and comments in case notes in 56 Harv. L. Rev. 314 (1942); 33 Va. L. Rev. 784 (1947); 96 U. of Pa. L. Rev. 287 (Dec. 1947); 48 Columbia L. Rev. 152 (Jan. 1948); 21 So. Calif. L. Rev. 220 (Feb. 1948); Rudick, 2 Tax L. Rev., *supra*, pp. 160–161; Kaplan, 5 Tax L. Rev., *supra*, pp. 91–92, 96; 24 Ind. L. J. 437 (Spring, 1949).

[35] This phrase originated in Section 805 of the Revenue Act of 1932 and is explained in the committee reports as follows (H. Rep. No. 708, *supra*, p. 48; S. Rep. No. 665, *supra*, p. 51 (1939–1 Cum. Bull. (Part 2), *supra*, pp. 491, 533):

"A clarifying provision limiting the requirement of an adequate and full consideration in money or money's worth

that an agreement, even though intended to be merged in the divorce decree, is regarded as "fair and equitable" by the divorce court, does not establish that the consideration for it was "adequate and full" within the meaning of the tax statutes. It may not be supposed that Congress intended to pass a law which could be circumvented by the expedient of entering into an agreement to make a transfer supported by inadequate money consideration, and then making the transfer in satisfaction of what amounts, in substance, to a consent judgment founded on the agreement. Cf. *Hooker* v. *Commissioner,* 174 F. 2d 863, discussed *supra,* pp. 30–31. Again, a divorce court would not interfere to prevent a spouse from making a larger transfer than the court would itself require. A state court seal should not be determinative of the meaning of consideration under the federal tax statutes, and its judgment in effect based on consent, should not *ipso facto* bind the Treasury, even where technically it has merged and superseded the agreement. [redacted] Under such circumstances

---

to liabilities founded on contract. The existing law might be open to a construction under which no claim against the estate would be deductible unless supported by an 'adequate and full consideration in money or money's worth', but the real intent could hardly have been to deny the deduction of liabilities imposed by law or arising out of torts, and the amendment whereby the requirement of a consideration applies only where the liability is founded on contract is designed to clear up any doubt which may be thought to exist."

the transfer is not in reality founded upon a judgment, but upon "a promise or agreement."

Moreover, the words "founded upon a promise or agreement" are not contained in the gift tax. The words common to both taxes, to which *Merrill* v. *Fahs*, 324 U. S. 308, 312–313, afforded identical meaning, are "adequate and full consideration in money or money's worth." It does not follow—and no such issue was there involved—that the transactions and transfers to be subjected to this common concept of consideration are always identical in the case of both taxes. Indeed, as already discussed, *supra*, pp. 43–44, with particular respect to the gift tax, Congress explicitly provided that indirect transfers are to be taxed. The committee reports state that the terms "transfer" and "indirectly" are used in the broadest and most comprehensive sense, and the Regulations prescribe that all transactions, whereby property is gratuitously transferred, regardless of the means or device employed, are subject to tax. Even where the device employed is a judgment directing a transfer in satisfaction only of marital rights in taxpayer's estate, the transfer should be taxable; the form of the transfer is immaterial.

In any event, the cited estate tax cases clearly have no application here, where by the express terms of both agreement and judgment the con-

tract was not superseded by the decree and the taxed transfer was founded upon and in payment of this subsisting binding contract obligation.

CONCLUSION

The decision of the Court of Appeals is correct and should be affirmed.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
LEE A. JACKSON,
I. HENRY KUTZ,
Special Assistants to the Attorney General.

OCTOBER 1950.

APPENDIX

Internal Revenue Code:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(b) *Expenses, Losses, Indebtedness, and Taxes.*—Such amounts—

* * * * *

(3) for claims against the estate,

(4) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate, * * *

* * * * *

as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or property taxes not accrued before his death, or any estate, succession, legacy, or inheritance taxes. The deduction herein allowed in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded upon a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth. * * *

For the purposes of this subchapter, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration "in money or money's worth."

* * * * *

(26 U. S. C. 1946 ed., Sec. 812.)

SEC. 1000. IMPOSITION OF TAX.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift. * * *

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a non-resident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. (26 U. S. C. 1946 ed., Sec. 1000.)

SEC. 1002. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year. (26 U. S. C. 1946 ed., Sec. 1002.)

SEC. 1005. GIFTS MADE IN PROPERTY.

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. (26 U. S. C. 1946 ed., Sec. 1005.)

Treasury Regulations 108, relating to the gift tax under the Internal Revenue Code:

SEC. 86.1. *Imposition of tax.*—The statute imposes no tax upon property, but subjects to tax transfers of property by gift. The statute taxes all such transfers of property * * * to the extent that they exceed the deductions authorized by section 1004. The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. (See section 86.8.) The tax applies to all individuals, whether resident or nonresident of the United States, but, in the case of a nonresident not a citizen, the tax applies only to transfers of property situated within the United States. For the definition of "resident," see section 86.4. With reference to the situs of property, see section 86.18.

SEC. 86.2 *Transfers reached.*—(a) *In general.*—The statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. Thus, for example, a taxable transfer may be effected by the declaration of a trust, the forgiving of a debt, the assignment of a judgment, the assignment of the benefits of a contract

of insurance, or the transfer of cash, certificates of deposit, or Federal, State, or municipal bonds. * * * Inasmuch as the tax also applies to gifts indirectly made, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See, further, section 86.8. * * *

SEC. 86.8. *Transfers for a consideration in money or money's worth.*—Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promises of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

SEC. 86.17. *Gifts made in property.*—A gift made in property is subject to the tax in the same manner as a gift of cash, and the amount of the gift is the value of the property at the date of the gift.

E. T. 19, 1946–2 Cum. Bull. 166, 168–169:

Advice has been requested concerning the application of the gift tax to transfers made pursuant to an agreement of the parties incident to a proceeding for divorce or legal separation.

* * * * *

The gift tax is supplementary to the estate tax. It taxes, to a large extent, transfers *inter vivos* which deplete the estate that the donor would otherwise leave at death. Taxability, therefore, under the gift tax of other than commercial transactions is said to be determined by, and to the extent of, absence of financial benefit to the transferor. (*Commissioner* v. *Wemyss, supra;* section 1002, *supra.*)

Under a decree of divorce or legal separation a husband's duty to support a divorced wife (alimony) customarily lasts only during the joint lives of the parties or until the divorced wife remarries. (Vernier, "American Family Laws," Volume II, 1932 and Supp. 1938.) The fulfillment, therefore, of this obligation by the husband merely amounts to the liquidation of a presently existing obligation, the satisfaction of which does not have the effect of diminishing or depleting the husband's estate to any greater extent than the payment of other existing legal obligations. On the other hand, a transfer to a wife under such a decree in settlement of inheritance rights is a present transfer of what would otherwise constitute a major portion of the husband's estate on death.

The construction spelled out in section 812 (b), *supra,* governs the interpretation of the phrase "adequate and full con-

sideration in money or money's worth" as that phrase is used in section 1002 of the Internal Revenue Code. (*Merrill* v. *Fahs, supra.*) The consideration for a transfer by way of property settlement other than relinquishment by the wife of her right to support and maintenance is the relinquishment by the wife of her marital rights in the husband's property or estate and falls squarely within the statutory provisions. Section 812 (b), however, makes no specific reference to support rights. It is the view of the Bureau that the surrender of support rights is not one of the "other marital rights" referred to in the section. The cases of *Meyer's Estate* v. *Helvering* (C. C. A. 2, 1940) (110 F. 2d 367, certiorari denied, 310 U. S. 651) and *Helvering* v. *United States Trust Co. et al.* (C. C. A. 2, 1940) (111 F. 2d 576) will no longer be followed to the extent that they hold that the right of a divorced wife to support from a former husband during the joint lives of the parties is a marital right in his property or estate.

With respect to transfers made pursuant to legal separation agreements or divorce decrees, it is the position of the Bureau that, for both estate and gift tax purposes, a release of support rights may constitute a consideration in money or money's worth. Accordingly, to the extent that a transfer does not exceed the reasonable value of the support rights of the wife, it is to be treated as made for an adequate and full consideration in money or money's worth. The question whether the transfer is in excess of reasonable support rights is for the determination of the Bureau. That portion of any transfer which is allocable

to the release by the wife of her property or inheritance rights is to be considered as not made "to any extent" for an adequate and full consideration in money or money's worth.

The establishment of a reasonable allocation is regarded as a proper matter for administrative determination by the Bureau in the absence of a reasonable allocation or segregation by the parties. In making this determination the facts and circumstances of each case will be separately considered. Elements to be considered are the amount of the husband's annual income, the extent of his assets, also, the life expectancies of the parties and the probability of the wife's remarriage, alimony almost universally being limited to such periods. An agreement of the parties may provide for payments extending beyond the period of their joint lives. The required allocation in such a case will involve a determination of the question whether the aggregate amounts paid and payable exceed normal support rights, which ordinarily would terminate upon the death of the husband. The contingency of the wife's remarriage may be measured by actuarial standards. (*Commissioner* v. *State Street Trust Co.*, (C. C. A. 1, 1942), 128 F. 2d 618; *Brotherhood* v. *Pinkston*, 293 U. S. 96 (1934); *Commissioner* v. *Marjorie D. Maresi, Executrix* (C. C. A. 2d), July 8, 1946, affirming, *Estate of P. M. Maresi*, 6 T. C., No. 74.)

With respect to the payment of the wife's counsel fees by the husband, the taxability as a gift of such payment is governed by whether the obligation is that

of the husband or of the wife. To the extent that the husband is under obligation to pay the wife's legal fees in divorce or legal separation, the payments therefor are not taxable as gifts.

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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

No. ~~606~~ 14

CORNELIA HARRIS, *Petitioner,*

—v.—

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRWIN N. WILPON
Counsel for Petitioner

INDEX

	PAGE
Statement	1
Reasons for Granting the Petition for Rehearing	3
Conclusion	9
Certificate	10

CITATIONS

Cases.

Burnet v. Guggenheim, 288 U. S. 280	6
City Bank Farmer's Trust Co. v. Pedrick, 168 F. (2d) 618, cert. den. 335 U. S. 898	7
Commissioner v. Bristol, 121 F. (2d) 129	6, 7
Commissioner v. Converse, 163 F. (2d) 131	3, 4, 5
Commissioner v. Maresi, 156 F. (2d) 929	3
Commissioner v. State Street Trust Co., 128 F. (2d) 618	3
Commissioner v. Swink, 155 F. (2d) 723	3
Commissioner v. Wemyss, 324 U. S. 303	7
Hesslein v. Hoey, 91 F. (2d) 954, cert. den. 302 U. S. 756	7
Merrill v. Fahs, 324 U. S. 308	3, 5, 8
Sanford v. Commissioner, 308 U. S. 39	7
United States v. Benedict, U. S. , 94 L. Ed. Adv. Op. 375	2, 5, 8
Yoke v. Fleming, 145 F. (2d) 472	3

PAGE

Statutes

Internal Revenue Code Section 812 (b) 3, 5
Internal Revenue Code Section 863 6

Miscellaneous

Sen. Rep. No. 275, 67th Cong. 1st Sess. p. 25 6

2 Paul, Federal Estate and Gift Taxation (1942 Ed.)
Sections 15.04, 16.01 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 596

CORNELIA HARRIS,-*Petitioner*,

—v.—

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner hereby respectfully requests a rehearing and reconsideration of that portion of the order of this Court dated March 27, 1950 which denied the petition for a writ of certiorari with respect to Question "1" presented by the petition for the writ.

Statement

The original petition for a writ of certiorari was filed on February 11, 1950. It presented three questions as follows:

1. Is Section 863 of the Internal Revenue Code in *pari materia* with Section 1000 (b) and to be construed with it,

so that transfers in the years, 1940, 1941 and 1942 of monies of the petitioner, a nonresident alien not engaged in business in the United States, on deposit with an American bank, are not deemed transfers of property situated within the United States for gift tax purposes?

2. Were the transfers made by the petitioner to her husband under a property settlement agreement dated February 27, 1943, incidental to a Nevada divorce, made for an adequate and full consideration in money or money's worth and thus not subject to gift tax?

3. Were the transfers made by the petitioner to her husband in 1943, in payment and discharge of a legal obligation imposed by the judgment of the Nevada Court entered March 6, 1943, and thus not subject to gift tax?

On March 27, 1950, this Court granted the petition limited to Questions "2" and "3" presented by the petition for the writ.

Rehearing of said petition with respect to Question "1" is sought on the grounds that the questions of law in said Question "1" are present in Questions "2" and "3" and will be required to be determined by this Court in resolving those questions and further that the decision of this Court in *United States* v. *Benedict*, U. S. , 94 L. Ed. Adv. Op. 375, 378, decided on February 13, 1950, after the original petition for a writ of certiorari herein was filed, appears to be applicable to Question "1" and the decision of the Court of Appeals on that question may not be in harmony with it.

Reasons for Granting the Petition for Rehearing

1. The question of the construction of the gift tax in *pari materia* with the estate tax is common to all three of the questions presented by the petition for the writ. The correctness of the application by the Court of Appeals of the decisions of this Court and particularly *Merrill* v. *Fahs*, 324 U. S. 308, is interwoven in all three questions.

Thus in Question "2", the primary basis upon which the Commissioner will seek to support the ruling below is that the holding of this Court in *Merrill* v. *Fahs, supra*, construing the gift tax in *pari materia* with the corresponding estate tax provision requires such a holding with respect to property settlements incidental to a divorce.

With respect to Question "3", the holdings that transfers under a separation agreement incorporated in a decree of divorce are founded on the decree and not upon the agreement and therefore under Section 812 (b) (5) of the Internal Revenue Code not required to be for an adequate and full consideration in money's worth to be exempt from the estate tax, are estate tax cases. (*Commissioner* v. *State Street Trust Co.* (C. A. 1), 128 F. (2d) 618, 620, 621; *Yoke* v. *Fleming* (C. A. 4), 145 F. (2d) 472; *Commissioner* v. *Swink* (C. A. 4), 155 F. (2d) 723; *Commissioner* v. *Maresi*, 156 F. (2d) 929, 930.)

In *Commissioner* v. *Converse*, 163 F. (2d) 131, 133, the Court of Appeals for the Second Circuit held this provision in Section 812 (b) (5) of the estate tax statute (appendix to original petition p. 22), to be in *pari materia* with and part of the gift tax statute which did not contain this exemption and accordingly held, following the above cited holdings under the estate tax, that such *inter vivos* transfers were not subject to the requirement that they be for an

adequate and full consideration in money or money's worth. The Court of Appeals said that "the underlying reason * * * as shown by the *Wemyss* and *Merrill* cases, is that the estate and gift taxes are in *pari materia*. *Sanford's Estate* v. *Commissioner*, 308 U. S. 39."

The Commissioner in his brief in the Court of Appeals in this case (p. 37) contended that this holding in the *Converse* case was erroneous. He argued:

> "The limiting language of the estate tax provision, Section 812 (b) of the Code, 'founded upon a promise or agreement' pointed to and relied upon in the *Marcsi* case, is absent from the gift tax. In the gift tax provisions of the Code, Congress has nowhere expressly excepted transfers founded upon judgments or directed that where a transfer is pursuant to a judgment, the reality and adequacy of consideration may not be inquired into. So to hold as an absolute rule in every case surely affords a simple method for evading the gift tax. The *Converse* case (p. 133) reasoned that its result was required by *Merrill* v. *Fahs*, supra. However, the words common to the estate and gift taxes to which *Merrill* v. *Fahs* (pp. 312-313) afforded identical meaning were 'adequate and full consideration'; (see, also, Point I, supra). No issue was there involved as to whether or not the transactions and transfers to be subjected to this common test of consideration were always identical in the case of both estate and gift taxes."

Point I of the Commissioner's brief in the Court of Appeals referred to in the above quote relates to Question "1" presented in the petition for the writ of certiorari herein.

The Court of Appeals however did not alter this holding in the *Converse* case.

Thus, in this Court, in his argument under Question "3", the Commissioner will undoubtedly ask this Court to overrule the *Converse* case, even though the provision in the estate tax statute held in *pari materia* in the *Converse* case, and the provision held in *pari materia* in *Merrill* v. *Fahs* are both contained in the same subdivision 5 of section 812 (b), and the Commissioner is thus in the position of contending that one part of the same subdivision of the subsection is in *pari materia* with the gift tax and another part is not.

Thus the question of the construction with and reading into the gift tax statute of an exemption which is omitted therefrom but contained in the corresponding estate tax statute is directly involved under Question "3" and will be required to be argued in full thereunder. This is precisely the issue in Question "1". The decision of this Court on the issue may affect the holding below with respect to Question "1", and it is therefore respectfully submitted that such holding should be before this Court on the appeal which it has already decided to hear.

In no prior adjudicated case has a transfer not subject to the estate tax been held to be subject to the gift tax, and likewise in no prior adjudicated case has the related provision of the gift tax statute been held not to be in *pari materia* with the corresponding estate tax statute.

2. The decision of the Court of Appeals with respect to Question "1" does not appear to be in harmony with the holding of this Court in *United States* v. *Benedict*, U. S. 94 L. Ed. Adv. Op. 375, 378, decided February 13, 1950, wherein this Court said:

> "On this precise question the (Internal Revenue) Code is silent. No provision of the Code and nothing in the legislative history or administrative practice expressly settles the course to be followed. We, therefore, seek the purposes of the applicable sections of the Code and adopt that construction which best gives effect to those purposes."

In *Burnet* v. *Guggenheim*, 288 U. S. 280, 288, this Court said on the question of the gift tax in *pari materia* with the estate tax:

> "It is an outcome of that process of development which has given us a rule for almost every imaginable contingency in the assessment of a tax under the provisions of Part I (estate tax). No doubt the draftsman of the statute would have done well if he had been equally explicit in the drafting of Part II (gift tax). This is not to say that meaning has been lost because extraordinary foresight would have served to make it clearer. Here as so often there is a choice between uncertainties. We must be content to choose the lesser."

See also *Commissioner* v. *Bristol* (C. A. 1), 121 F. (2d) 129, 136.

Section 863 of the Code (appendix to original petition p. 23), was enacted as Section 403 (b) (3) in 1921. There was then no gift tax. Its purpose clearly appears in Senate Report No. 275, 67th Congress, 1st Session page 25, as follows:

> "Section 403 (b) (3). Under existing law the proceeds of insurance upon the life of a nonresident decedent, where the insurer is a domestic company, is deemed

> property within the United States. This has been found to place American insurance companies at a disadvantage in competing with foreign companies, and, in order to remedy this situation, the proposed bill expressly states that such insurance shall not be regarded as property situated in the United States. A like provision is made respecting moneys deposited with any person carrying on a banking business, by or for a nonresident decedent who is not engaged in business in the United States at the time of his death."

A concomitant purpose was "to encourage the maintenance by aliens of bank deposits in our banks." (*City Bank Farmer's Trust Co.* v. *Pedrick*, 168 F. (2d) 618, 619, cert. den. 335 U. S. 898.)

The primary purpose of the gift tax was to close up gaps in the estate tax. (*Sanford* v. *Commissioner*, 308 U. S. 39, 42, 44; *Commissioner* v. *Wemyss*, 324 U. S. 303, 307; *Commissioner* v. *Bristol*, 121 F. (2d) 129, 136; *Hesslein* v. *Hoey*, 91 F. (2d) 954, 956, cert. den. 302 U. S. 756, 2 Paul, Federal Estate and Gift Taxation (1942 Ed.) Section 15.04 p. 962, Section 16.01 p. 1060.)

When the gift tax statute was enacted there was thus no reason to tax as gifts transfers of bank deposits and insurance policies of nonresident aliens, since they were not subject to estate tax and no estate tax avoidance was occasioned by such transfers.

The Congressional Committee Reports and all other sources are silent as to any expression of intent to newly create such a gift tax on transfers which were then exempt from tax or to in any way narrow or limit the aid to American banks and insurance companies in competing with foreign companies.

In *Merrill* v. *Fahs*, 324 U. S. 308, 312, this Court pointed out that in that case the amendment to the estate tax statute was added by Congress specifically because of contrary holdings by the Courts. Yet, though thus acting consciously and deliberately, Congress omitted the amendment from the simultaneously enacted gift tax statute. Despite this, the majority of this Court held that the amendment, under *pari materia*, must be read into the gift tax statute.

Here, there is no evidence of any conscious or deliberate intent by Congress to alter or change its purpose to maintain the exemption from tax to aid American companies.

There is no record of any assertion by the Commissioner prior to this case that transfers of such deposits by non-resident aliens are subject to gift tax. The Treasury regulations with respect to the tax are merely a reiteration of the statutes. The reason for the lack of any prior adjudication may be found in the fact that prior to this case, the Commissioner had apparently made no attempt to assess a gift tax on such transfers.

Thus, the reasoning of the dissenting opinion of Judge Swan in this case (R. 41) seems more in harmony with the holding of this Court in *United States* v. *Benedict, supra*, Judge Swan says:

> "The estate statute and the gift tax statute are in *pari materia* and must be construed together. If Congress had intended by the 1932 Act to deprive the American insurers and banks of advantages they had enjoyed for six years it seems likely that the legislative history would have disclosed such purpose. It does not. I think the literal words of Sec. 1000 (b) should yield to the purpose of the exemption."

CONCLUSION

For the foregoing reasons the petition for rehearing of the petition for a writ of certiorari with respect to Question "1" presented by the petition should be granted.

Respectfully submitted,

IRWIN N. WILPON,
Counsel for Petitioner.

March 1950

Certificate

I hereby certify that this petition for rehearing of the petition for a writ of certiorari with respect to Question "1" presented by the petition is presented in good faith and not for delay. That the ground with respect to the common question presented by the three questions presented in the petition for the writ was not previously urged because the petitioner could not anticipate that this Court would not grant or deny the petition in its entirety but would grant the petition in part and deny it in part; and that the decision of this Court in *United States* v. *Benedict*, U. S. ; 94 L. Ed. Adv. Op. 375, cited in the petition for rehearing was decided after the petition for a writ of certiorari was filed herein.

IRWIN N. WILPON,
Counsel for Petitioner.